

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1977

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No. 77-

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IN THE MATTER OF EDNA SMITH,

Appellant.

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ON APPEAL FROM THE  
SUPREME COURT OF THE  
STATE OF SOUTH CAROLINA

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JURISDICTIONAL STATEMENT

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1977

In the Matter of     )  
                              )  
Edna Smith,            )  
                              )  
          Appellant.  )

JURISDICTIONAL STATEMENT

Appellant appeals from the order of the Supreme Court of South Carolina entered March 17, 1977, which order publicly reprimanded appellant for allegedly unethical conduct. This disciplinary proceeding against a member of the bar of the State of South Carolina was initiated as an administrative proceeding. The complaint asserted no jurisdictional statute but only that appellant committed an "act of misconduct or has indulged in ... [a] practice which tends to pollute the administration of justice or to bring the legal profession or the courts into disrepute", constituting "solicitation in violation of the Canons of Ethics."<sup>1</sup>

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1. The full complaint and letter on which the complaint is based are appended hereto at 23a.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at \_\_\_ S.C. \_\_\_, 233 S.E.2d 301 (1977), and is appended hereto at 1a. The report by a three-member panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina recommending a private reprimand is unreported and is appended hereto at 15a. This recommendation was affirmed and a private reprimand administered orally on January 9, 1976, by the full Board of Commissioners.

Appellant, by an action in the federal district court, attempted to enjoin the disciplinary proceedings ab initio. That action was dismissed by the district court without reaching the merits, and the dismissal was affirmed on appeal by the United States Court of Appeals, American Civil Liberties Union v. Bozardt, 539 F.2d 340 (4th Cir. 1976). Three judges dissented from denial of a petition for rehearing en banc in an unreported opinion appended hereto at 28a. This Court denied certiorari, \_\_\_ U.S. \_\_\_, 97 S.Ct. 639 (1976).

### JURISDICTION

A disciplinary complaint was issued naming appellant as respondent on October 9, 1974, by the Secretary of the Board of Commissioners on Grievances and Discipline of the South Carolina Supreme Court. On January 9, 1976, the Board issued a private reprimand to appellant. Acting on appellant's petition to expunge the private reprimand, and with no cross-petition to increase the punishment, the Supreme Court of South Carolina, sua sponte, administered a public reprimand to appellant on March 17, 1977.

Appellant had defended the allegations against her on the grounds that she was engaged in constitutionally protected free speech and associational activities and that the procedures denied her due process of law. The Supreme Court of South Carolina issued the public reprimand construing certain Disciplinary Rules to apply to her conduct and holding the Rules and the procedures by which punishment was rendered to be constitutionally valid as applied to appellant.

A notice of appeal was filed in the Supreme Court of South Carolina on April 15, 1977. 27a. By order dated June 15, 1977, the Chief Justice extended the time for docketing this appeal through July 11, 1977.

This Court has jurisdiction to consider this appeal by virtue of 28 U.S.C. §1257(2). The following cases sustain the jurisdiction of this Court: Bates v. State Bar of Arizona, 45 U.S.L.W. 4895 (1977); In re Griffiths, 413 U.S. 717 (1973); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, n. 3 (1963).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are set forth in full in the appendix, infra, at 18a, as follows:

United States Constitution,  
Amendment One

United States Constitution,  
Amendment Fourteen, §1

Supreme Court of South Carolina,  
Rule on Disciplinary Procedure, §4

American Bar Association, Code  
of Professional Responsibility,  
Disciplinary Rule 2-103(D),  
adopted by the Supreme Court of  
South Carolina

American Bar Association, Code  
of Professional Responsibility,  
Disciplinary Rule 2-104(a),  
adopted by the Supreme Court of  
South Carolina.



# QUESTIONS PRESENTED<sup>1</sup>

I. Whether the disciplinary rules as construed and applied to appellant are vague and overbroad and encroach upon first amendment associational activity by prohibiting attorneys from offering the services of the American Civil Liberties Union.

II. Whether the decision is in conflict with NAACP v. Button, 371 U.S. 415 (1963), and subsequent cases, which held that collective activity to assure meaningful access to the courts is protected by the first amendment unless the state demonstrates a compelling interest in support of the particular narrowly drawn regulation. Bates v. State Bar of Arizona, 45 U.S.L.W. 4895 (1977).

III. Whether the decision below conflicts with In re Ruffalo, 390 U.S. 544 (1968), in that the charges of which the appellant had notice did not state all the elements of the violations found after the hearing.

IV. Whether the decision is in conflict with Thompson v. City of Louisville, 362 U.S. 199 (1960), in that there was no evidence nor findings to establish all the elements of the disciplinary rules found to be violated.

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1. To the extent that the questions presented are more properly raised by a petition for certiorari, appellant requests that these papers be so treated. 28 U.S.C. §2103.

# STATEMENT OF THE CASE

This matter is a professional disciplinary proceeding formally initiated on October 9, 1974. The complaint issued by the State Board of Commissioners on Grievances and Discipline alleged that appellant had committed "solicitation in violation of the Canons of Ethics" by writing a letter on August 30, 1973, which offered the services of the American Civil Liberties Union (ACLU). Appellant denied (and has throughout these proceedings denied) that she had committed "solicitation" and alleged other defenses, including the vagueness of the State rules and the protected associational character of her conduct.

A panel of the Board of Commissioners held a hearing on the Complaint on March 20, 1975. The panel filed a report recommending that appellant be found to have violated the Canons of Ethics for soliciting a client on behalf of the ACLU, not on behalf of herself. The panel recommended a private reprimand as discipline. After a hearing on January 9, 1976, the Board of Commissioners approved the panel report and administered the private reprimand.

Appellant petitioned the South Carolina Supreme Court to review and expunge the private reprimand. Review was granted. There was no cross-petition seeking an increased penalty, yet on March 17, 1977, the South Carolina Supreme Court entered its order adopting the panel report and, sua sponte, increasing the discipline administered from a private reprimand to a public reprimand.

Appellant is a black woman who was admitted to the South Carolina Bar in September, 1972. She is active in the ACLU of South Carolina.

In 1973, local and national newspapers reported that certain pregnant mothers on welfare in Aiken County, South Carolina, most of whom were black, were being sterilized or threatened with sterilization as a condition for continuing to receive Medicaid assistance. See "3 Carolina Doctors Are Under Inquiry in Sterilization of Welfare Mothers," New York Times, July 22, 1973, p. 30. Mr. Gary Allen, who was active in a number of community organizations, knew some of the Medicaid patients who had been sterilized. A local organization to which Mr. Allen belonged contacted appellant through the South Carolina Council on Human Rights, a private, non-profit organization, with which appellant was also associated, to request advice and assistance on behalf of the welfare mothers. In response to the request, appellant went to Aiken, where she met with Mr. Allen and with three women who had been sterilized in Aiken County, including Mrs. Williams, the subject of the alleged solicitation.

Following the Aiken meeting, appellant received several telephone calls and a letter from Mr. Allen, advising her that Mrs. Williams wished to bring suit, and appellant was requested by Mr. Allen to write to Mrs. Williams.<sup>1</sup>

1. Mrs. Williams testified that she had not told Mr. Allen she wanted to bring suit; however, the uncontradicted testimony of appellant and Mr. Allen was that Mr. Allen had so advised her, and the tribunals below made

In response to this request, appellant wrote the letter of August 30, 1973, that is the subject of this proceeding. The letter contained the following paragraph, by which appellant was found to have committed "solicitation":

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

Mrs. Williams, shortly after receiving this letter, went to Dr. Pierce's office for treatment for her child. Dr. Pierce's attorney was present, read the letter, and questioned her about litigation against his client. Mrs. Williams disclaimed any interest in a lawsuit, and at the attorney's direction called appellant from Dr. Pierce's office to so inform her. Appellant never made any effort to contact Mrs. Williams further. Two women subsequently sued Dr. Pierce, Doe v. Pierce, No. 74-475 (S.C. 1974), but neither were represented by appellant or her associate employed by the ACLU.<sup>1</sup>

1. The letter to Mrs. Williams had been in the possession of Dr. Pierce's attorney since August of 1973, and was known to the South Carolina Assistant Attorney General, who represented other defendants in Doe v. Pierce, (footnote continued to next page)



The factual basis for the public reprimand issued Petitioner is as follows:

The evidence is inconclusive as to whether the Respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages. 6a.

[The only way in which the ACLU would possibly receive financial benefit would be by receipt of a court award of attorney's fees.]

This was held to be in violation of two Disciplinary Rules:

(1) Disciplinary Rule 2-103(D), which, by its terms, solely prohibits an attorney from "knowingly assist[ing] a person or organization ... to promote the use of his services or those of his partners or associates." There was no finding that appellant or the ACLU ever promoted the use of her own

(footnote continued from preceding page)  
in early April, 1974; however, the Attorney General did not forward the letter to the Board on Grievances and Discipline until August 19, 1974, after an attempt to have Doe v. Pierce dismissed for solicitation proved unsuccessful. The letter was forwarded by A. Camden Lewis, an attorney herein and for certain defendants in Doe v. Pierce.

professional services, or those of her associates.

(2) Disciplinary Rule 2-104(A), which, by its terms, states that an attorney who has given unsolicited advice "shall not accept employment resulting from that advice." There was never even any contention that appellant or anyone else accepted employment by Mrs. Williams.

Appellant raised the federal questions of her constitutional defenses in the answer and amended supplemental answer to the complaint. They were raised as exceptions in the petition for review filed with the State Supreme Court, pp. 2-3, and as questions presented in the brief on the merits to that court, pp. 1-2. See also, 1a-2a.

The Supreme Court of South Carolina found, by its adoption of the commission report, the evidence sufficient under the recited rules. This appeal followed.

#### THE QUESTIONS ARE SUBSTANTIAL

##### I

The Disciplinary Rules as construed, and as applied to appellant, are vague and overbroad in violation of the First Amendment and the Due Process Clause.

Edna Smith, appellant here, has been disciplined by the South Carolina Supreme Court for offering, gratis and at the express request



of another, the services of the ACLU to a person whom Ms. Smith had talked with earlier and whom Ms. Smith believed had a valid cause of action. Her conduct was wholly consistent with Canon 2 of the Code of Professional Responsibility,<sup>1</sup> and indistinguishable from the conduct of the attorneys offering the assistance of the NAACP in NAACP v. Button, 371 U.S. 415 (1963). Instead of taking the disciplinary rules at their face value and taking care to avoid trenching on constitutionally protected activity, the court below gave the rules a novel construction far beyond their obvious meaning and far beyond the contemplation of those who drafted the rules. The result is not only to punish appellant for engaging in protected activity but also to chill citizens in the exercise of their constitutional rights by putting lawyers on notice that the disciplinary rules -- their narrow terms notwithstanding-- can be applied to the most time-honored traditions of advising citizens of their rights and of the availability of counsel.

The South Carolina Supreme Court by construing the disciplinary rules to cover protected activity, has rendered those rules necessarily vague and overbroad.

The decision below not only squarely contradicts this Court's decision in NAACP v. Button, 371 U.S. 415 (1963), and inflicts

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1. "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." See also Disciplinary Rules 2-104(A)(2).

personal obloquy upon appellant; if upheld, it also threatens to impair the legal assistance activities on behalf of civil liberties of the American Civil Liberties Union and its affiliated organizations. The ACLU, which is the oldest and largest organization in the nation devoted exclusively to the cause of civil liberties,<sup>1</sup> has for years stated frankly in The Guide for ACLU Litigation, ¶5, that:

It is not necessary to await clients seeking out the Union; it is often better for the Union to take the initiative in civil liberties cases. NAACP v. Button, 371 U.S. 415 (1963), provides that organizations need not stand by while potential litigants forfeit through ignorance their constitutional rights. An organization with our purposes can thus advise people that it will handle cases for them.

The ACLU's opinion of its function is widely shared. Referring to the activities of appellant regarding the origin of Doe v. Pierce, the case subsequently filed on the Aiken sterilizations, the Honorable Sol Blatt, Jr., United States District Judge for the District of South Carolina, made the following

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1. See NAACP v. Button, 371 U.S. 415, 440, n. 19 (1963).

statement at a hearing on September 24, 1974:<sup>1</sup>

This Court feels in its posture of [sic] the American Civil Liberties Union has a duty and an obligation under the manner in which it operates to seek out and help those who it feels are not able to help themselves, either their lack of knowledge or lack of funds, the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACLU, in contacting, if that in fact did happen. . .

(Emphasis supplied.)

Deposition of Mary Roe (Shirley Brown), Doe v. Pierce, No. 74-475 (D.S.C. 1974) (Sept. 24, 1974, p. 23).

Obviously, if the decision below is sustained, the ACLU and countless other legal assistance

1. Three judges of the United States Court of Appeals for the Fourth Circuit reached a similar conclusion, 33a:

The services of ACLU--assisting lay persons to recognize their legal rights and making counsel available--are the very services for which the individual plaintiff is sought to be disciplined and they are constitutionally protected activities.

organizations<sup>1</sup> will be barred from affirmatively offering assistance to the poor and untutored. It was precisely the importance of protecting associational activity to foster meaningful access to the courts that guided this Court to the result of NAACP v. Button, supra, 371 U.S. at 429-31. See, Bates v. State Bar of Arizona, 45 L.W. 4895, 4902 n. 32 (1977). To affirm summarily this judgment would be to decide, without plenary consideration by this Court, that Button is overruled, in a decision binding upon courts throughout the nation, and endorsing a most expansive construction of these Disciplinary Rules, which have been adopted in most states.

In Button, the NAACP paid modest attorney's fees to its staff and cooperating attorneys in connection with desegregation lawsuits. The organization also sent these same attorneys to meetings of parents to encourage desegregation lawsuits. This Court held that activity to be protected, in a doctrine recently summarized in the Bates opinion, supra at note 32:

The Court often has recognized that collective activity undertaken to obtain meaningful access

1. The approach adopted in this case could be applied to the activities of the National Right to Work Defense Fund; the NAACP Legal Defense and Education Fund, Inc.; the Mexican-American Legal Defense and Education Fund; the Sierra Club Legal Defense Fund; the Natural Resources Defense Council; the National Chamber Litigation Center (U.S. Chamber of Commerce); the Puerto Rican Legal Defense and Education Fund; and the Native American Rights Fund, to name only a few.



to the courts is protected under the First Amendment. See United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222-224 (1967); Brotherhood of Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 7 (1964); NAACP v. Button, 371 U.S. 415, 438-440 (1963). It would be difficult to understand these cases if a lawsuit were somehow viewed as an evil in itself. Underlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them.

A. Vagueness. The fundamental error of the State Court construction is apparent from the Court's own statement of its findings:

...that [Appellant] had violated Disciplinary Rules 2-103(D)(5)(a) and (c) and 2-104(A)(5) of the Code of Professional Responsibility by soliciting a client on behalf of the American Civil Liberties Union.1a.

The State Court expressly declined to find that appellant had solicited the client on her own behalf. The prospective client never accepted the offer of assistance.

The most thorough examination of the cited Disciplinary Rules, 18a, will fail to disclose any provision of either rule that, on its face, prohibits an attorney from offering the legal assistance of an organization. DR 2-103(D) prohibits an attorney from allowing an organization to promote his own services -- nowhere does it appear that the Rule prohibits an attorney from offering the services of an organization, where there is neither allegation nor proof that the organization promoted the services of any particular attorney.<sup>1</sup> DR 2-104(A) prohibits an attorney from accepting employment, with certain exceptions. It gives no notice whatsoever, much less the fair notice required for due process of law, that it prohibits an attorney from offering the services of an organization to a person who never employed any counsel.<sup>2</sup>

1. This section was drafted by the ABA to regulate group legal services and not the type organization considered in NAACP v. Button. See, Smith, "Canon 2: 'A Lawyer Should Assist the Legal Profession in its Duty to Make Legal Counsel Available.'" 48 Tex.L.Rev. 285, 306-10 (1970). The American Bar Association has substantially rewritten this section so that it now approves more explicitly the activities of pre-paid group legal services. 61 ABA Jo. 464 (1975).

2. Again with regard to notice, it should be pointed out that the ethical strictures on solicitation had received little enforcement in South Carolina prior to July, 1975. See, In re Bloom, 265 S.C. 86, 217 SE2d 143 (1975).

The only logical interpretation that appellant's counsel have been able to place upon the decision below is that the State Court adopted a general notion of "solicitation" that included any offer of legal services, whether or not specifically prohibited by the Disciplinary Rules, and then looked to DR 2-103(D)(1)-(5) for a definition of organizations authorized to offer legal services. If this was the approach below, it suffered the vice of vagueness on two counts: (1) the rules did not give fair notice of the definition of "solicitation" adopted, and (2) the rules did not give fair notice of the court's draconian construction of the exemptions.

B. Overbreadth. In Bates v. State Bar of Arizona, supra, 45 U.S.L.W. at 4903, a bar disciplinary proceeding, this Court recently reaffirmed the proper application of the doctrine of overbreadth as applied to protected (non-commercial) speech:

First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute. See NAACP v. Button, 371 U.S. 415, 433 (1963).

Appellant submits that the Supreme Court of California has adopted the correct standard as to whether a communication about obtaining legal services is presumptively protected: that the communication has any discernable purpose in addition to attracting business for the attorney's private law practice. Jacoby v. California State Bar, 45 U.S.L.W.

2529 (Ca. 1977); Belli v. State Bar, 10 Cal3d 824 (1974). Of course, measured by this standard, appellant's offer of the assistance of an organization was presumptively protected, and it therefore fell to the state to demonstrate both (1) that the state had a compelling interest in punishing the communication and (2) that the statute prohibiting the conduct was so narrowly drawn as not to be applicable to protected activity.

Instead of narrowly construing its Disciplinary Rules, the State Court construed them to prohibit any attorney from offering the services of any organization that has either of the following characteristics:

(1) the organization has as a "primary purpose,"<sup>1</sup> [here construed as any major activity of the organization] the provision of legal services; and

(2) the organization at any time, in any proceeding, prays for attorneys' fees awarded by a court against a defendant.

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1. There was testimony in the record to the effect that the purpose of the ACLU is to protect civil liberties, and to this end it engages, as did the NAACP, in Button, in public education, in legislative lobbying, and in litigation. The lack of fundamental fairness in the proceeding below was illustrated by the treatment of the issue of the purpose of the (footnote continued to next page)



By these tests, the activity in Button, where the NAACP sent staff attorneys to meetings of parents to encourage school desegregation lawsuits, and paid modest fees to the attorneys for any lawsuits brought, was not protected.<sup>1</sup> Furthermore, under this

(footnote continued from preceding page)  
ACLU. The Grievance Board curtailed appellant's attempts to describe the purposes of the ACLU, stating, "I don't think the underlying purposes of the American Civil Liberties Union really is germane to this inquiry [sic] at all." The Board and the Supreme Court, then, proceeded to rely on their own interpretation of the "primary purpose" of the organization as a crucial element in sustaining disciplinary action.

1. In lawsuits sponsored by the NAACP, whose conduct was sanctioned in Button, attorneys cooperating with the NAACP had been praying for court awards of attorney's fees for years, and the federal courts made such awards in many suits pending at the time of the Button decision. See, e.g., Bell v. School Board of Powhatan County, Va., 321 F.2d 494 (4th Cir. 1963) (en banc). Indeed, the complaints in County School Board v. Thompson, 240 F.2d 59 (4th Cir. 1956), and Allen v. School Board of Charlottesville, 249 F.2d 462 (4th Cir. 1957), both cases sponsored by the NAACP and cited by this Court in the Button decision, 371 U.S. at 435, n. 16, had prayed for awards of fees to the plaintiffs' attorneys. (See Appendices filed with the Clerk, U.S. Court of Appeals for the Fourth Circuit.) Congress recently found, (footnote continued to next page)

construction, the rule prohibits attorneys from accepting referrals of pro bono cases from the ACLU. A rule that destroys the ability of private attorneys to offer pro bono legal services through an organization plainly contradicts the first amendment. Compare, NAACP v. Button, supra, 371 U.S. at 440, n. 19.

## II.

The decision below conflicts with NAACP v. Button in that the state offered no compelling state interest to justify punishing appellant for her associational activity.

The decision below is squarely and irretrievably in conflict with the decision of this Court in NAACP v. Button, 371 U.S. 415 (1963), as amplified in subsequent decisions. Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Association,

(footnote continued from preceding page)  
in considering the "Civil Rights Attorney's Fees Awards Act of 1976," that:

... fee awards are essential if the Federal statutes to which S.2278 applies [42 U.S.C. §§1981 et seq.] are to be fully enforced.... [t]he effects of such fee awards are an integral part of the remedies necessary to obtain such compliance.

5 U.S. Code Congressional & Admin. News 5908, 5913 (1976).

389 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971). In Button, the NAACP sent its staff attorneys to meetings for the purpose of soliciting plaintiffs for civil rights lawsuits, particularly in school desegregation. The NAACP's purpose was "to secure the elimination of all racial barriers which deprive Negro citizens in equal citizenship rights...." To this end, the NAACP engaged in education, lobbying and "also devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation..." 371 U.S. at 419-420. Ms. Smith was assisting the ACLU in doing no more. The only differences from Button are that here the ACLU is seeking to protect civil liberties, rather than the NAACP seeking to protect equal citizenship, and the incident occurred in South Carolina in the mid-1970's rather than in Virginia in the early 1960's.

If the State Court's regulation of the legal profession is to avoid constitutional infirmity, it must be upon a showing that the possibility that an attorney may be paid presents a "serious danger"; or more to the point, that the regulation is justified by a compelling state interest. No such factor was claimed or shown here. Nor, for these purposes, could even a rational distinction be drawn between organizations that have litigation as one major activity as opposed to organizations that do not. Nor has this Court ever suggested that organizations forfeit the protection of the First Amendment by availing themselves of remedies provided by Congress, such as praying, in proper cases, for court awards of attorney's fees.

## III

The decision below is squarely in conflict with In re Ruffalo, 390 U.S. 544 (1968), in that fair notice of the charges was not given to appellant, and also in conflict with Thompson v. City of Louisville, 362 U.S. 199 (1960), in that not all the elements of the cited Disciplinary Rules were proved or found by the Court below.

A. Elements of the disciplinary violations.

Appellant was held to have "violated DR 2-103(D)(5)(a) by attempting to solicit a client for a non-profit organization which, as its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit organization." DR 2-104(A)(5) was cited by the court below as proscribing the seeking, not the acceptance of employment, 9a. The State Court properly found that a violation of a particular disciplinary rule was necessary to sustain discipline. 1a.

DR 2-104(A) appears to require the following elements:

- (1) giving unsolicited legal advice to a layman that he should take legal action, and
- (2) accepting employment as a result of that advice.



No one has claimed appellant did the latter.<sup>1</sup> The former, by itself, is never proscribed.

Disciplinary Rule 2-103(D) requires the following elements:

(1) that there be a person or organization that recommends, furnishes, or pays for legal services; and

(2) that the lawyer knowingly assists that person or organization to promote the use of his services or those of his partners or associates.

Likewise, with respect to DR 2-103(D), the complaint did not allege that any organization was promoting the services of any particular attorney, including appellant or her associates.

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1. But the State Court held that the latter was not an element: "The seeking of and not the acceptance of employment is proscribed by DR 2-104(A)(5)." This is directly contrary to all known constructions of DR 2-104(A); see Smith, supra, at p. 16, n. 1, 48 Tex.L.Rev. at 295. In addition, the court below did not find that appellant sought employment for herself or her associates.

## B. Notice of the elements.

In re Ruffalo, supra, established that bar disciplinary proceedings are quasi-criminal in nature, and require fair notice to the attorney prior to the hearing on the violation. At a minimum, this would require specification of the elements of the offenses alleged. In re Gault, 387 U.S. 1 (1967); Wolff v. McDonnell, 418 U.S. 539, 564 (1974). The disciplinary complaint in this matter never alleged most of the above-stated elements of the Rules found violated, nor did it refer to either disciplinary rules by number. It alleged simply that appellant had committed "solicitation" by sending a letter that offered the services of the ACLU.

With respect to DR 2-104(A)(5), none of the elements was alleged in the Complaint. With respect to DR 2-103(D), there was never any allegation that the ACLU was promoting the services of appellant or her associates. "The charge must be known before the proceedings commence." In re Ruffalo, supra, 390 U.S. at 551. The failure to specify either the Disciplinary Rules or the elements thereof prior to the hearing was a fatal defect.

## C. Findings as to each element.

Thompson v. City of Louisville, supra, 362 U.S. at 206, established that it is "a violation of due process to convict and punish a man without evidence of his guilt." Here there is no evidence that appellant accepted employment, yet she is punished for violating DR 2-104(A), which requires acceptance as an

element. There was no finding that appellant or the ACLU promoted her own services or the services of her associates,<sup>1</sup> as expressly required by DR 2-103(D); instead, the State Court found that appellant solicited a client "on behalf of the ACLU," 6a. Under the Thompson case, then, it is clear that the finding of violations of both disciplinary rules contravened due process because an essential element of the offenses was absent from the proofs and the findings.

#### CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal, or, in the alternative, grant a writ of certiorari to review the judgment below.

Respectfully submitted,

LAUGHLIN McDONALD  
NEIL BRADLEY  
CHRISTOPHER COATES  
RAY P. McCLAIN

ATTORNEYS FOR APPELLANT

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1. Contrary to the State Court opinion, 3a, appellant's associate, Mr. Buhl, who was a staff attorney for the ACLU, never represented any plaintiff in Doe v. Pierce.

## THE STATE OF SOUTH CAROLINA In The Supreme Court

In The Matter of Edna Smith . . . .Petitioner.

Opinion No. 20386  
Filed March 17, 1977

### PUBLIC REPRIMAND

Laughlin McDonald, of Atlanta, Georgia; Ray P. McClain, of Charleston; and Melvin H. Wulf, of New York, New York, for petitioner.

Attorney General Daniel R. McLeod and Assistant Attorneys General A. Camden Lewis and Richard B. Kale, all of Columbia, for respondent.

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PER CURIAM: This matter is before the Court pursuant to an order, issued under Section 34 of the Rule on Disciplinary Procedure, granting petitioner's request for review of a private reprimand administered by the Board of Commissioners on Grievances and Discipline (Board). Petitioner is a member of the Bar of this State and the private reprimand was issued upon findings that she had violated Disciplinary Rules 2-103(D)(5) (a) and (c) and 2-104 (A)(5) of the Code of Professional Responsibility by soliciting a client on behalf of the American Civil Liberties Union (ACLU).

The grounds urged by petitioner defensively before the Board are basically the same as she now presents to have the findings and private reprimand by the Board set aside. These are:

1. Does the record sustain the findings of the Board that petitioner violated the cited provisions of the Code of Professional Responsibility?
2. Was petitioner's conduct protected by the constitutional guarantees of freedom of speech and association?
3. Is Rule 4(d) of the South Carolina Supreme Court's Rule on Disciplinary Procedure void for vagueness and overbreadth?
4. Did the complaint in this case give petitioner notice of the charge as required by due process of law?
5. Does the record sustain the findings of the Board that there was no retaliatory motive on the part of the office of the Attorney General in this proceeding?

We are convinced that the record amply sustains the finding of the Board that petitioner violated the Code of Professional Responsibility and that disciplinary action was required. While we affirm the findings of the Board that petitioner was guilty of unethical conduct, we conclude that the facts and circumstances are sufficiently aggravated to justify a public, instead of a private, reprimand. Accordingly, this opinion will be published in the Reports of this Court.

This matter was first heard before a Hearing Panel which filed its report and recommendations

with the Board. The following portions of the panel report, affirmed by the Board, set forth the material facts and correctly dispose of the issues presented in this appeal:

"The Respondent, Edna Smith, is a practicing attorney in Columbia, South Carolina, having been admitted to the Bar in September 1972. During the period in which the acts complained of in the complaint occurred, respondent was an associate in the Carolina Community Law Firm, in an expense sharing arrangement with each attorney keeping his own fees. One of the associate attorneys was a staff counsel for the ACLU and was a Counsel of Record in the Pierce case (hereinafter mentioned). She was also a legal consultant of the South Carolina Council on Human Relations, from whom she received compensation, and was an officer of the Columbia Branch of the ACLU, and was a cooperating attorney with the ACLU.

"In response to information received through the South Carolina Council on Human Relations, she contacted one Gary Allen, in Aiken, South Carolina, to arrange for her to talk to people there who had been sterilized. The meeting was held in Aiken during the month of July, 1973, at the office of Gary Allen. Marietta Williams is a Black woman who had consented to be sterilized by Dr. Clovis Pierce. At the meeting in Gary Allen's office, the respondent advised those present, who included Mrs. Williams and other women who had been sterilized by Dr. Clovis H. Pierce, of their legal rights and specifically that they could bring suit for money damages against



Dr. Pierce. There was no further contact between respondent and Mrs. Williams until Mrs. Williams received a letter from respondent dated August 30, 1973. In this letter respondent referred to the meeting in Mr. Allen's office and indicated that the ACLU would like to file a lawsuit for her for money against the doctor who performed the operation. This letter was written on the letterhead of the Carolina Community Law Firm and signed by her as attorney-at-law.

"Prior to the institution of this proceeding, a class action entitled Jane Doe and Mary Roe, on their behalf and on behalf of all others similarly situated, v. Clovis H. Pierce, M.D., et al., was commenced in the United States District Court of South Carolina to declare the acts of the defendant in violation of the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments of the Constitution, to enjoin such acts, and for money damages and attorneys' fees. Respondent contended at a procedural hearing in that case, Judge Blatt's ruling in allowing certain questions to be propounded to a witness involving the contact of the respondent with the witness was res judicata or acted as a collateral estoppel against this proceeding, which contention Judge Chapman dismissed as is hereinafter reflected.

"After the filing of this disciplinary proceeding against the respondent, an action was brought in the United States District Court of South Carolina, Columbia Division, to enjoin the members of the Board of Commissioners on Grievances and Discipline, individually and as members of the Board, and the Attorney General

of South Carolina from prosecuting or otherwise processing the complaint in this proceedings. Complaint also prayed for costs, plus attorneys' fees and a declaration that the complaint before the Board was in violation of her rights under the First and Fourteenth Amendments. In dismissing the complaint, on the grounds that the complainant failed to state facts entitling respondent to Federal intervention, Judge Chapman held:

'(1) That to be entitled to injunctive relief against an action pending in a State Court the plaintiff must not only prove bad faith and harassment, which was alleged in this action, but also show that unless restrained the proceeding would cause grave and irreparable injury without providing any reasonable prospect that the State Court would respect and satisfactorily resolve the constitutional issue raised, which was not alleged or proved in the case.

'(2) That Judge Blatt's ruling in Doe v. Pierce, in regards to allowing questions as to solicitation, was solely because they might go to the issue of the appropriateness of the class action, and was in no way res judicata or acted as a collateral estoppel upon the Board or the Supreme Court of South Carolina.'

"The evidence presented indicated that the ACLU has only entered cases in which substantial civil liberties questions are involved, and that contrary to their former practice, they are now asking for fees, in addition to any damages that might be awarded to the plaintiffs, and

that they are never reimbursed out of the damages awarded the plaintiffs.

"The evidence is inconclusive as to whether the respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages.

"Respondent's contention that her actions were protected by the First and Fourteenth Amendments of the United States Constitution gives us some concern, but the other defenses are of little merit and will be disposed of first.

"Respondent's contention that Judge Blatt's ruling in a preliminary hearing in the case of Jane Doe and Mary Roe v. Clovis H. Pierce, M.D., et al., is res judicata or operates to estop the Board of Commissioners on Grievances and Discipline is patently erroneous. As stated in Respondent's own Pre-trial Memorandum, 'Under the Doctrine of res judicata a former judgment operates as a bar against a second action upon the same cause of action, but in a later action upon a different cause of action it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. Lorber v. Vista Irrigation District, 127 F. (2d) 628 (10th Cir. 1942), Exhibitor's Poster Exchange, Inc. v. National Screen Service Corp., 421 F. (2d) 1313 (5th Cir. 1970). The relevant inquiry into the application of this doctrine is identity of

parties, subject matter, cause of action and whether or not the persons against whom estoppel is asserted had a full and fair opportunity for judicial resolution of the said issue.' In the case before Judge Blatt neither of the parties to this proceeding were parties, the subject matter and causes of action were totally different, and finally the complaint in this case had no opportunity for judicial resolution of the issue of solicitation.

"Respondent's contention that the proceedings were initiated in retaliation because of her race, sex and in violation of the First and Fourteenth Amendments are not well taken. While respondent did introduce evidence of her race, sex and certain of her associational activities, there is a total lack of proof that the Board of Commissioners on Grievances and Discipline or the Attorney General issued the complaint against her in retaliation. Respondent properly takes the position that evidence is particularly suspect when it is procured by a party who is acting adversely to the respondent in other litigation. However, the evidence here does not bear out her position that the complaint against her was initiated by the Office of the Attorney General, and even if it had been the Attorney General was not acting adversely to the respondent in other litigation in which she was a party, as the letter written to Mrs. Williams came to the attention of the Attorney General during proceedings in the case of Jane Doe and Mary Roe v. Pierce.

"Respondent contends that Rule 4 of the Rules of Disciplinary Procedure of the South Carolina Supreme Court is vague and overbroad.



Misconduct is defined in Rule 4(b) as violation of any provision of the Canons of Professional Ethics as adopted by this Court from time to time. The Code of Professional Responsibility of the American Bar Association was adopted by the South Carolina Supreme Court on March 1, 1973. Canon 2 of the Code of Professional Responsibility deals specifically with solicitation. While the complaint may have been loosely drafted in that violation of Rule 4(d) of the South Carolina Disciplinary Rules was charged, wherein misconduct was defined as conduct tending to pollute or obstruct the administration of justice or to bring the Courts or the legal profession into disrepute, the specification of the charge was solicitation, and the Panel is of the opinion that violation of any of the disciplinary rules is such an action as would, at least, bring the legal profession into disrepute.

"In any event the Panel is of the opinion that respondent was fully apprised of the charges against her by the complainant, and even if she had not been, the proper procedure would have been by motion to have the complaint made more definite and certain.

"Disciplinary Rule 2-104 (A) provides:

'(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

. . . .

'(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.'

"Here, by respondent's own testimony, she met with Mrs. Williams in Aiken, gave unsolicited advice as to what her rights were as she, the respondent, saw them. Then respondent followed up with her letter of August 30, 1973, wherein she solicited Mrs. Williams to join in a class action suit for money damages to be brought by the ACLU. The seeking of and not the acceptance of employment is proscribed by DR 2-104 A (5).

"Disciplinary Rule 2-103 D (5) provides:

'(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:



. . .

'(5) Any other non-profit organization that recommends, furnishes or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the service requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

"(a) The primary purpose of such organizations do not include the rendition of legal service.

. . .

"(c) Such organization does not derive a financial benefit from the rendition of legal service by the lawyer."

. . .

"Testimony at the hearing established that one of, if not the primary purpose of the ACLU, was the rendition of legal services. It was also set out in respondent's Pre-trial Memorandum that the ACLU and its state affiliates on any given day are involved in several thousand active cases throughout the country. It is, also, the policy of the ACLU to ask for attorneys' fees in their lawsuits, and their fees go into its central fund and are used among other things to pay costs and salaries and expenses of staff attorneys.

"Consequently, the Panel is of the opinion that the respondent has violated Disciplinary Rule 2-103 (D)(5)(a)(c) and is therefore guilty of solicitation.

"In the case of NAACP v. Button, 371 U.S. 415, 9 L. Ed. (2d) 405, 83 S. Ct. 328, the facts revealed that the State of Virginia had statutory regulations of unethical conduct of attorneys from 1849, which forbade solicitation of legal business in the form of 'running' or 'capping'. Prior to 1956 no attempt was made to proscribe under such regulations the activities of the NAACP, which had been carried on openly for years. In 1956, however, the Virginia Legislature amended the Virginia Code by passage of Chapter 33, forbidding solicitation of legal business by a 'runner' or 'capper' to include in the definition of 'runner' or 'capper' an agent for an individual or organization which retains a lawyer in connection with an action to which it is a party and in which it has no pecuniary right or liability. The Supreme Court in its decision stated 'the only issue before us is this constitutionality of Chapter 33, as applied to the NAACP.'

"The final query then is was the solicitation protected under the First and Fourteenth Amendments, as earnestly urged by respondent. DR 2-103 (D)(5) specifically recognizes the inherent constitutional problems and provides for the same by allowing an attorney to cooperate with the legal service activities of a 'non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances, and to the extent that controlling constitutional interpretation at the time of

the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met....' Thus, DR 2-103 (D)(5) prohibits solicitation except where controlling constitutional interpretations mandate the allowance of the specific service. Furthermore, in order for an attorney to solicit on behalf of a non-profit organization, the four conditions of DR 2-103 (D)(5) (a--d) must be met unless application of these four conditions has, jointly or severally, been prohibited by controlling constitutional interpretations.

"The first of the above mentioned four conditions is that '[t]he primary purpose of [non-profit] organizations do not include the rendition of legal services.' The ACLU, the non-profit organization herein involved, by its own admission, may have several thousand lawsuits in progress at any one day and they classify themselves as private attorneys general. It follows, therefore, that its primary purpose is the rendition of legal services. This Panel has not found, nor has it been furnished with, any case showing that a state is prohibited, on constitutional grounds, from regulating the activities of attorneys' soliciting clients on behalf of a non-profit organization which has as one of its primary purposes the rendition of legal services. Respondent relies on four cases: NAACP v. Button, supra, 371 U.S. 415, 9 L. Ed. (2d) 405, 83 S.Ct. 328; Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 12 L.Ed. (2d) 89, 84 S.Ct. 1113; United Mine Workers v. Illinois Bar Association, 389

U.S. 217, 19 L.Ed. (2d) 426, 88 St.Ct. 353 and United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 28 L.Ed. (2d) 339, 91 S. Ct. 1076. None of the four non-profit organizations involved in the above cases, has as one of its primary purposes, the rendition of legal services. In NAACP v. Button, the court addresses itself to the legal services rendered by the NAACP. However, the court appears to characterize the NAACP as a political, rather than legal organization, and depicts litigation as an adjunct to the overriding political aims of the organization.

"That the American Bar Association considered the aspect of the NAACP case is obvious from the fact that the second of the above conditions allows solicitation where 'the recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.' As pointed out litigation is the primary purpose of the ACLU; it is not simply incidental to its primary purpose. This condition is not constitutionally prohibited, but is rather constitutionally required by NAACP v. Button.

"In that there is no question but that the respondent has not violated the second and third conditions of DR 2-103 (D)(5), there is no need to question whether they are constitutionally prohibited or not.

"Respondent has, therefore, violated DR 2-103 (D)(5)(a) by attempting to solicit a client for a non-profit organization which, as

its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit organization. If respondent's contention that her actions were protected by the First and Fourteenth Amendments of the Constitution were upheld, it would amount to a holding that the pertinent provision of Canon 2 of the Code of Professional Responsibility was unconstitutional, which we are not prepared to do."

It is therefore ORDERED that petitioner, Edna Smith, be and she hereby is publicly reprimanded.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J.B. Ness A.J.

s/ Wm. L. Rhodes, Jr. A.J.

s/ George T. Gregory, Jr. A.J.

STATE OF SOUTH CAROLINA) BEFORE THE BOARD  
COUNTY OF RICHLAND ) OF COMMISSIONERS  
ON GRIEVANCES AND  
DISCIPLINE

In the Matter of: )  
John W. Williams, Jr., )  
Secretary of the Board )  
of Commissioners on )  
Grievances and Dis- )  
cipline, )  
Complainant, )

-vs-

Edna Smith, )  
Respondent. )

PANEL REPORT

This proceeding was commenced on or about the 10th day of October, 1974, by a Notice and Complaint in which the Respondent was charged with solicitation in violation of the Canons of Professional Ethics. Respondent answered, denying the charge, and setting up the following affirmative defenses:

1. That her actions were protected by Canon 2 of the Code of Professional Ethics;

2. That her actions were protected by the First and Fourteenth Amendments of the Constitution of the United States;

3. That the Board of Commissioners on Grievances and Discipline was estopped by



prior proceedings in Doe v. Pierce, No. 74-75, United States District Court, South Carolina, and alternatively that such proceedings were res judicata as to the subject matter in the case;

4. That this proceeding was instituted in retaliation because of her race, sex and associational activities with the ACLU, in violation of the First and Fourteenth Amendments of the United States Constitution;

5. That Rule 4 of the Rules of Disciplinary Procedure of the South Carolina Supreme Court is vague and overbroad.

The matter came on for hearing before the undersigned panel on the 20th day of March, 1975, at Columbia, South Carolina.

The Complainant was represented by Richard B. Kale, Jr., Esquire, Assistant Attorney General of Columbia, South Carolina. The Respondent was represented by Laughlin McDonald, Esquire, ACLU Foundation, Inc., Atlanta, Georgia, and Ray P. McClain, Esquire, Charleston, South Carolina.

The Panel has carefully considered the evidence and the arguments and briefs of Counsel, and makes the following Report:

\* \* \* [1]

In addition to the concern which this case has given the Panel in its findings with

1. The omitted portion of the panel report is quoted without change (with the exception of adding full citations) in the opinion of the Supreme Court, 3a-14a.

reference to the matter of violation of the Code of Professional Responsibility, the Panel has been impressed by the fact that the Respondent's activities were neither aggravated nor widespread. The record before the Panel does not indicate any continuous activity on the part of the Respondent, which is prohibited by the Canons of Professional Ethics. The violation as found by the Panel from the record is isolated to one particular class action.

After considering the entire record, and after giving the Respondent the benefit of the doubt, it is the recommendation of the Panel that the Respondent be given a private reprimand.

Respectfully submitted,

s/ H. Hayne Crum

s/ Melvin B. McKeown

s/ John B. McCutcheon

Members of Panel.

CONSTITUTIONAL AND OTHER  
PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment One:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, Amendment  
Fourteen:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court of South Carolina, Rule on  
Disciplinary Procedure, Section 4:

4. Misconduct Defined.

Misconduct, as the term is used herein, means any one or more of the following:

- (a) violation of any provision of the oath of office taken upon admission to the practice of law in this State;
- (b) violation of any of the Canons of Professional Ethics as adopted by this Court from time to time;

(c) commission of a crime involving moral turpitude;

(d) conduct tending to pollute or obstruct the administration of justice or to bring the courts or the legal profession into disrepute.

(e) emotional or mental stability so uncertain, as in the judgment of ordinary men, would render a person incapable of exercising such judgment and discretion as necessary for the protection of the rights of others and/or their property or interest in property.

American Bar Association, Code of Professional Responsibility, adopted by Supreme Court of South Carolina, Disciplinary Rule 2-103(D):

DR 2-103 Recommendation of Professional Employment.

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide non-profit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

(4) A bar association representative of the general bar of the geographical area in which the association exists.

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member of beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

American Bar Association, Code of Professional Responsibility, adopted by Supreme Court of South Carolina, Disciplinary Rule 2-104:

DR 2-104 - Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D) (1) through (5), to the extent and under the conditions prescribed therein.

(3) A lawyer who is furnished or paid by any of the offices or organizations enumerated in DR 2-103(D) (1), (2), or (5) may represent a member or beneficiary thereof



to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

STATE OF SOUTH CAROLINA ) BEFORE THE BOARD OF  
COUNTY OF RICHLAND ) COMMISSIONERS ON  
GRIEVANCES AND DIS-  
CIPLINE

In the Matter of: )

John W. Williams, Secretary )  
of the Board of Commissioners )  
on Grievances and Discipline, )

Complainant, )

vs. )

Edna Smith, )

Respondent. )

COMPLAINT

Complainant alleges:

I.

The Complainant is the Secretary of the Board of Commissioners on Grievances and Discipline and a duly licensed attorney in the State of South Carolina, and the Respondent is engaged in the practice of law as a duly licensed attorney who resides or maintains an office in the County of Richland, State of South Carolina.

II.

On information and belief the Respondent committed the following act of misconduct or has indulged in the following practice which

tends to pollute the administration of justice or to bring the legal profession or the courts into disrepute:

- A. On or about August 30, 1973, Respondent wrote a letter to Mrs. Marietta Williams of 347 Sumter Street, Aiken, South Carolina, a copy of which is attached, by the terms of which Respondent informed Mrs. Williams that "The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation." Complainant is informed and believes that the foregoing constitutes solicitation in violation of the Canons of Ethics.

WHEREFORE, Complainant prays that the Board of Commissioners on Grievances and Discipline consider these allegations and make such disposition as may be appropriate.

s/ John W. Williams  
Complainant

[Verification Omitted]

August 30, 1973

Mrs. Marietta Williams  
347 Sumter Street  
Aiken, South Carolina 29801

Dear Mrs. Williams:

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

Now I have a question to ask of you. Would you object to talking to a women's magazine about the situation in Aiken? The magazine is doing a feature story on the whole sterilization problem and wants to talk to you and others in South Carolina. If you don't mind doing this, call me collect at 254-8151 on Friday before 5:00, if you receive this letter in time. Or call me on Tuesday morning (after Labor Day) collect.

I want to assure you that this interview is being done to show what is happening to women against their wishes, and is not being done to harm you in any way. But I want you to decide, so call me collect and let me know of your decision. This practice must stop.

About the lawsuit, if you are interested, let me know, and I'll let you know when we will come down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf.

Sincerely,

s/ Edna Smith  
Edna Smith  
Attorney-at-Law

[Filed April 15, 1977]

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

In the matter of Edna Smith,

Petitioner.

NOTICE OF APPEAL TO THE  
SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Edna Smith, the petitioner above-named, hereby appeals to the Supreme Court of the United States from the final order imposing discipline on her entered in this matter on March 17, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

s/ Ray P. McClain  
RAY P. McCLAIN

Attorney for Petitioner



UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

[Filed April  
No. 75-1335 30, 1976]

American Civil Liberties  
Union and Jane Koe,

Appellants,

versus

O. Harry Bozardt, Jr., H. Hayne Crum,  
Joseph O. Rogers, Jr., Marion H. Kinon,  
Edward M. Royall, II, George F. Coleman,  
Robert A. Hammett, Thomas J. Thompson,  
Conning B. Gibbs, Jr., Lowell W. Ross,  
Frank E. Harrison, J. Malcolm McLendon,  
C. Thomas Wyche, William L. Bethea, John  
B. McCutcheon, Melvin B. McKeown, Jr.,  
individually and as members of the Board  
of Commissioners on Grievances and Discipline,  
and their successors; and the Attorney  
General of South Carolina,

Appellees.

ORDER

Upon consideration of the petition for rehearing it is ORDERED, with the consent and approval of Judge Bryan and Judge Field, that the petition for rehearing be and the same hereby is denied.

Upon consideration of the suggestion for a rehearing en banc, a poll of the court having been requested by a regular active member of the court, it was established that a majority

of the regular members of the court in active service did not favor rehearing en banc,

NOW, THEREFORE, IT IS ORDERED that the suggested rehearing en banc be and the same hereby is denied.

For the court:

s/ Herbert S. Boreman  
Senior United States  
Circuit Judge.

WINTER, Circuit Judge, dissenting:

I dissent from the denial of rehearing en banc.

This is a classic case for such treatment. It presents a question of exceptional importance, Rule 35(a), F.R.A.P., and there is substantial reason to conclude that the case is wrongly decided.

I.

The panel holds that the principles set forth in Younger v. Harris, 401 U.S. 37 (1971), and its progeny, oust federal jurisdiction of an action under 42 U.S.C. §1983 for declaratory and injunctive relief where there is a pending a state administrative proceeding, the object of which is to determine if the individual plaintiff should be subject to disciplinary action, not criminal sanctions, for alleged misconduct as a member of the bar.\*

\* At the outset, I express serious reservations that even if Younger applies, it would support the result reached by the majority. Younger appears to recognize that it is inapplicable where a plaintiff shows "bad faith, harassment, or any other unusual circumstance that would call for equitable relief." 401 U.S. at 54. The complaint was dismissed notwithstanding plaintiffs' allegations that the disciplinary inquiry "was initiated against plaintiff Koe in bad faith for purposes of and has the effect of, harassment and retaliation and chilling and discouraging the activities of (footnote continued to next page)

What is at stake in the state proceedings is the right of a licensee to practice her profession; there is no claim that, if the individual plaintiff did the things with which she is charged, any criminal statute of South Carolina was infringed.

Under presently decided controlling authorities, the outermost reach of the Younger principle of federal non-intervention was Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), which held that a district court should not exercise jurisdiction to determine the constitutionality of a statute making a movie theatre which shows obscene films a nuisance and requiring its closing when there was pending an earlier filed state civil proceeding under the statute. Huffman recognized federal civil injunctive relief ought to be more conservatively granted when the object of relief was a state officer enforcing a state statute than in a case between private litigants--a concept implicit in Younger--but that Younger rested also "upon the traditional reluctance of courts of equity ... to interfere with a criminal prosecution." 420 U.S. at 640. Thus, the rationale articulated in Huffman was that

[W]e deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of

(footnote continued from preceding page)  
ACLU and the giving of solicited and unsolicited advice to lay persons that they should obtain counsel or take legal action."

Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding ... while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws. 420 U.S. 604-05.

Huffman does not govern this case, and Younger should not be applied here. Although the district court ought not to enjoin the administrative proceeding unless the plaintiffs' right to relief is free from doubt, I see no basis on which to say that federal jurisdiction is ousted because the proceeding is criminal or quasi-criminal in nature. I think that the panel's decision flies in the teeth of Mitchum v. Foster, 407 U.S. 225 (1972) (holding that an action under 42 U.S.C. §1983 was an exception to the anti-injunction statute, 28 U.S.C. §2283); Gibson v. Berryhill, 411 U.S. 564 (1973) (holding that a federal court could enjoin a proceeding before the Alabama Board of Optometry where, as here,

plaintiffs allege bias and harassment); and Steffel v. Thompson, 415 U.S. 452 (1974) (holding that declaratory relief, such as that prayed here, could be granted where a state criminal prosecution was threatened but not pending.) See also, Taylor v. Kentucky State Bar Assoc., 424 F.2d 478, 482 (6 Cir. 1970) (holding that bar disciplinary proceedings at the administrative level are not "proceedings in a state court.")

## II.

Only the individual plaintiff is the subject of the state administrative inquiry; the ACLU is not. Yet the latter has a substantial interest in the state proceedings. The impact of the state proceedings on the willingness of lawyers to volunteer and cooperate with ACLU in providing legal assistance to those whose constitutional rights have been violated is manifest. The services of ACLU -- assisting lay persons to recognize their legal rights and making counsel available -- are the very services for which the individual plaintiff is sought to be disciplined and they are constitutionally protected activities. United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963). See In re Ades, 6 F.S. 467, 475-76 (D. Md. 1934), for a persuasive historical compilation by a district judge, later a distinguished member of this court.

It seems to me that under these circumstances Steffel holds that even if Younger



is a bar to jurisdiction over the claim of the individual plaintiff, the claim of ACLU can and should be litigated. See also Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

### III.

Thus, I would conclude that for these several reasons the panel's decision is incorrect. We should grant rehearing en banc and reach a different result.

Judge Craven and Judge Butzner authorize me to say that they join in these views.

NOV 17 1977

MICHAEL RODAK, JR., CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1977

-----  
No. 77-56  
-----

IN THE MATTER OF EDNA SMITH,

Appellant.

-----  
On Appeal From The  
Supreme Court of The  
State of South Carolina  
-----

JOINT APPENDIX

---

Jurisdictional Statement Filed July 9,  
1977

Probable Jurisdiction Noted October 3,  
1977

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<u>Docket Entries</u>	<u>Date</u>
Complaint	Oct. 10, 1974
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Hearing before the Panel of the Board of Commissioners on Grievances and Disci- pline	Mar. 20, 1975
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Hearing before the Board of Commissioners on Griev- ances and Discipline and Oral Issuance of Private Reprimand	Jan. 9, 1976
Opinion of the Supreme Court of South Carolina Issuing Public Reprimand	Mar. 17, 1977
Notice of Appeal	Apr. 15, 1977

\* There is no formal docket entry list.

STATE OF SOUTH CAROLINA) BEFORE THE BOARD  
 ) OF COMMISSIONERS  
 COUNTY OF RICHLAND ) ON GRIEVANCES AND  
 DISCIPLINE

In the Matter of:

John W. Williams, Secretary )  
 of the Board of Commissioners )  
 on Grievances and Discipline, )

Complainant, )

vs. )

COMPLAINT

Edna Smith, )

Respondent. )

Complainant alleges:

I.

The Complainant is the Secretary of the Board of Commissioners on Grievances and Discipline and a duly licensed attorney in the State of South Carolina, and the Respondent is engaged in the practice of law as a duly licensed attorney who resides or maintains an office in the County of Richland, State of South Carolina.

II.

On information and belief the Respondent committed the following act of misconduct or has indulged in the following practice which tends to pollute the administration of justice or to bring the



legal profession or the courts into disrepute:

- A. On or about August 30, 1973, Respondent wrote a letter to Mrs. Marietta Williams of 347 Sumter Street, Aiken, South Carolina, a copy of which is attached, by the terms of which Respondent informed Mrs. Williams that "The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation." Complainant is informed and believes that the foregoing constitutes solicitation in violation of the Canons of Ethics.

WHEREFORE, Complainant prays that the Board of Commissioners on Grievances and Discipline consider these allegations and make such disposition as may be appropriate.

s/ John W. Williams  
Complainant

[Verification Omitted]

[Attachment to Complaint]

August 30, 1973

Mrs. Marietta Williams  
347 Sumter Street  
Aiken, South Carolina 29801

Dear Mrs. Williams:

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

Now I have a question to ask of you. Would you object to talking to a women's magazine about the situation in Aiken? The magazine is doing a feature story on the whole sterilization problem and wants to talk to you and others in South Carolina. If you don't mind doing this, call me collect at 254-8151 on Friday before 5:00, if you receive this letter in time. Or call me on Tuesday morning (after Labor Day) collect.

I want to assure you that this interview is being done to show what is happening to women against their wishes, and is not being done to harm you in any way. But I want you to decide, so call me collect and let me know of your decision. This practice must stop.

About the lawsuit, if you are interested, let me know, and I'll let you know when we will come down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf.

Sincerely,

s/ Edna Smith  
Edna Smith  
Attorney-at-Law

[The following civil complaint was served on the Secretary of the Board as the answer of Edna Smith to the disciplinary complaint.]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

AMERICAN CIVIL ) [Filed Oct. 31,  
LIBERTIES UNION and ) 1974]  
JANE KOE, )

Plaintiffs, )

v. )

O. HARRY BOZARDT, JR., )  
H. HAYNE CRUM, JOSEPH )  
O. ROGERS, JR., MARION )  
H. KINON, EDWARD M. )  
ROYALL, II, GEORGE F. )  
COLEMAN, ROBERT A. )  
HAMMETT, THOMAS J. )  
THOMPSON, COMING B. )  
GIBBS, JR., LOWELL W. )  
ROSS, FRANK E. HARRISON, )  
J. MALCOLM McLENDON, C. )  
THOMAS WYCHE, WILLIAM L. )  
BETHEA, JOHN B. )  
McCUTCHEON, MELVIN B. )  
McKEOWN, JR., individu- )  
ally and as members of )  
the Board of Commis- )  
sioners on Grievances )  
and Discipline, and )  
their successors; and )  
the ATTORNEY GENERAL OF )  
SOUTH CAROLINA, )

Defendants. )

CIVIL ACTION  
NO. 74-1703

COMPLAINT

Jurisdiction

1. This complaint arises under the first and fourteenth amendments of the

Constitution of the United States and 42 U.S.C. § 1983. Jurisdiction is conferred on this court by 28 U.S.C. §§1331, 1343(3), 2201 and 42 U.S.C. §§ 1983 and 1988. The matter in controversy exceeds \$10,000.00 exclusive of interest and costs.

2. This is an action for equitable relief and declaratory judgment of the unconstitutionality of disciplinary procedures instituted against plaintiff Jane Koe by defendants and to prevent deprivation under color of state statute, ordinance, regulation, custom or usage of rights, privileges or immunities secured to plaintiffs by the first and fourteenth amendments of the Constitution of the United States.

3. Plaintiff American Civil Liberties Union (hereinafter "ACLU") is a nationwide non-partisan organization of approximately 250,000 members dedicated solely to the preservation of the liberties safeguarded by the Bill of Rights. During its fifty-four years of existence the ACLU has sought to protect the rights of privacy and equal protection. Plaintiff Jane Koe is over the age of 21 years.

She is a resident and citizen of Richland County, South Carolina. She prosecutes this action under the fictitious name of Jane Koe to protect her privacy and professional reputation.

4. Defendants O. Harry Bozardt, Jr., H. Hayne Crum, Joseph O. Rogers, Jr., Marion H. Kinon, Edward M. Royall, II, George F. Coleman, Robert A. Hammett, Thomas J. Thompson, Coming B. Gibbs, Jr., Lowell W. Ross, Frank E. Harrison, J. Malcolm McLendon, C. Thomas Wyche, William L. Bethea, John B. McCutcheon, and Melvin B. McKeown, Jr., are the duly appointed, elected and acting members of the Board of Commissioners on Grievances and Discipline (hereinafter "Board") pursuant to the Rule on Disciplinary Procedure of the South Carolina Supreme Court. All of the personal defendants are residents and citizens of South Carolina and are sued individually and in their official capacities.

5. The ACLU undertakes to secure attorneys to represent persons without cost or fee or other charge in state and federal courts for denial of constitutional rights through its paid and



retained staff and system of cooperating attorneys. Cooperating attorneys serve without fees or compensation of any kind, and without any expectation thereof.

6. Plaintiff Jane Koe is a duly licensed attorney in the State of South Carolina, is engaged in the practice of law and maintains an office in Columbia, South Carolina. She is associated with the ACLU as a cooperating attorney, is presently acting as an officer of the South Carolina affiliate of the ACLU, and serves in both capacities without fee or pay or any expectation thereof. She does not have and never has had any financial interest or expectation of gain or reward of any kind in connection with correspondence, representations, conversations or dealings of any kind with any person in her capacity as a cooperating attorney or officer of the ACLU.

7. Prior to August 30, 1973, plaintiff Koe was contacted by a Mr. Gary Allen, of whom she had prior knowledge and knew to be acting on behalf of a Mrs. M.W. with apparent and actual authority to so act. He requested that plaintiff Koe or the ACLU undertake to

represent Mrs. M.W. in an action against certain persons who procured, performed or authorized her sterilization. In response to such request, she wrote Mrs. M.W. on August 30, 1973, stating the willingness of the ACLU to undertake to secure her representation.

8. Plaintiff Koe talked thereafter with Mrs. M.W. on several occasions about her proposed law suit. However, Mrs. M.W. elected not to proceed with litigation and plaintiff Koe's involvement with her was terminated. Other women residing in Aiken, South Carolina, however, who had been sterilized or threatened with sterilization, elected to proceed with litigation and filed a damage action through lawyers associated with the ACLU, in Doe v. Pierce, Civ. No. 74-475, D.S.C. Plaintiff Koe does not represent any of the parties in Doe v. Pierce, nor has she any direct involvement in that case.

9. Upon information and belief, attorneys representing some of the defendants in Doe v. Pierce secured a copy of the August 30, 1973, letter from plaintiff Koe to Mrs. M.W. and attempted to raise

as a defense in that suit that the action was barred or rendered unlawful because of solicitation. On September 24, 1974, during the deposing of one of the plaintiffs in Doe v. Pierce, Honorable Sol Blatt, Jr., who had knowledge of the August 30, 1973, letter, permitted certain questions to be propounded to that witness involving her contacts with plaintiff Koe, but solely as to the issue of the appropriateness of the suit as a class action. The court ruled that plaintiff Koe had not committed solicitation as follows:

Judge Blatt: All right, now let the record show that the other question present to the Court was the question pertaining to this witness as to how she came to meet or to know [Jane Koe] and so this record will be clear and recognize that the Court may clear it some that this question probably goes to the issue of solicitation. This Court feels in its posture of the American Civil Liberties

Union has a duty and an obligation under the manner in which it operates to seek out and help those who it feels are not able to help themselves, either their lack of knowledge or lack of funds, the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACL [sic], in contacting if that in fact did happen, the plaintiffs but the Court feels that the issue of contact or solicitation does go the question of validity or the appropriateness of a class action. Because of that and only because of that this Court feels that it is an appropriate question to ask this plaintiff.

10. Plaintiff Koe was served on October 11, 1974, with a complaint and notice in an action before the Board of Commissioners on Grievances and Discipline, a copy of which is attached hereto under seal as Exhibit A (original only), charging her with conduct which

tends to pollute the administration of justice or to bring the legal profession or the courts into disrepute in that her letter of August 30, 1973, to Mrs. M.W. constitutes solicitation in violation of the Canons of Ethics.

11. Upon information and belief, the complaint was initiated and will be prosecuted before the Board by the Attorney General of South Carolina or his attorneys, who also represent certain of the defendants in Doe v. Pierce.

12. Plaintiffs deny that plaintiff Koe has committed any act of solicitation, but allege that the prior ruling of the district court in Doe v. Pierce involving alleged solicitation by plaintiff Koe was withheld from the Board by the Attorney General of South Carolina or his attorneys at the time the complaint was initiated, and that such complaint was initiated against plaintiff Koe in bad faith for purposes of, and has the effect of, harassment and retaliation and chilling and discouraging the activities of the ACLU and the giving of solicited and unsolicited advice to lay persons that they should obtain counsel or take legal action.

13. The ACLU has in the past and intends in the future to educate laypersons to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

14. The Board has no authority to supervise or discipline the conduct of attorneys in their practice before the courts of the United States.

15. The actions of defendants herein complained of threaten to cause and will cause irreparable injury and harm to plaintiff Koe's professional reputation and standing in the community and will hold her up to public ridicule and scorn.

#### First Cause of Action

16. The initiation, filing and processing of a complaint against plaintiff Koe by defendants impermissibly burdens and chills protected activity and deprives all plaintiffs of rights guaranteed by Canon 2 of the Code of Professional Ethics of the American Bar association and the first and fourteenth amendments of the Constitution of the United States.



Second Cause of Action

17. The proceedings against plaintiff Koe before the Board of Commissioners on Grievances and Discipline are collaterally estopped by prior proceedings held in Doe v. Pierce, No. 74-475, D.S.C., and alternatively, the district court proceedings are res judicata as to the subject matter contained in the complaint filed against plaintiff Koe.

Third Cause of Action

18. The Board of Commissioners on Grievances and Discipline has no authority to supervise or discipline the conduct of attorneys in their practice before the courts of the United States, so that proceedings by such board against plaintiff Koe are null and void and deprive all plaintiffs of rights guaranteed them by the first and fourteenth amendments of the Constitution of the United States.

Fourth Cause of Action

19. The complaint filed against plaintiff Koe before the Board of Commissioners on Grievances and Discipline was initiated in bad faith and in retaliation against her in violation of the rights of plaintiffs protected by the

first and fourteenth amendments of the Constitution of the United States.

Fifth Cause of Action

20. Rule 4(d) of the Rules of Disciplinary Procedure of the South Carolina Supreme Court pursuant to which the complaint against plaintiff Koe was filed is vague and overbroad and does not contain an ascertainable standard in violation of the rights of plaintiffs guaranteed by the first and fourteenth amendments of the Constitution of the United States.

21. There is between the parties an actual controversy as herein set forth. Plaintiffs are suffering irreparable injury and will suffer irreparable injury in the future by reason of the acts of defendants herein complained of. Plaintiffs have no other plain, adequate or complete remedy to redress the wrongs and unlawful acts herein complained of other than this action for declaration of rights and an injunction. Any other remedy to which they could be remitted would be attended with such uncertainty and delays as to deny substantial relief, would involve multiple suits, cause further irreparable injury, damage and inconvenience.

WHEREFORE, plaintiffs respectfully pray that this Court will take jurisdiction of this cause and do the following:

- 1) Declare that the complaint filed against plaintiff Koe and proceedings before the Board of Commissioners on Grievances and Discipline violate rights secured to plaintiffs by the first and fourteenth amendments of the Constitution of the United States;
- 2) Issue a permanent injunction enjoining the defendants, their agents, officers, servants and employees and successors in office and all those acting in concert or participation with them from prosecuting or otherwise processing the complaint against plaintiff Koe before the Board of Commissioners on Grievances and Discipline; and
- 3) Plaintiffs respectfully pray that the costs of this proceedings,

including their reasonable and necessary attorneys fees, be taxed against the defendants.

Respectfully submitted,

s/ Laughlin McDonald  
Laughlin McDonald  
52 Fairlie Street, NW  
Atlanta, Georgia 30303

s/ Ray P. McClain  
Ray P. McClain  
Epstein & McClain  
P.O. Box 608  
Charleston, South  
Carolina 29402

Melvin L. Wulf  
22 East 40th Street  
New York, New York 10016

Charles Morgan, Jr.  
410 First Street, SE  
Washington, DC 20003

ATTORNEY FOR PLAINTIFFS

STATE OF SOUTH CAROLINA      BEFORE THE  
County of Richland      BOARD OF COMMISSIONERS ON  
GRIEVANCES AND  
DISCIPLINE

In the Matter of:	)	
	)	
John W. Williams, Secretary	)	
of The Board of Commissioners	)	
on Grievances and Discipline,	)	AMENDED
	)	AND
Complainant,	)	SUPPLE-
	)	MENTAL
vs.	)	ANSWER
	)	
Edna Smith,	)	
	)	
Respondent.	)	

The Respondent answers the complaint as follows:

1. Any allegation of the complaint not hereinafter specifically admitted, qualified, or explained is denied.
2. The allegations of paragraph 1 of the complaint are admitted.
3. The allegations of paragraph 2 of the complaint are denied.
4. Respondent alleges that the complaint impermissibly burdens protected activity and deprives her of rights guaranteed by Canon 2 of the Code of Professional Ethics of the American Bar Association and implementing Ethical Considerations

and Disciplinary Rules and the first and fourteenth amendments of the Constitutional [sic] of the United States.

5. Respondent alleges that these proceedings are collaterally estopped by prior proceedings in Doe v. Pierce, No. 74-475, District of South Carolina, and alternatively such proceedings are res judicata as to the subject matter herein.

6. Respondent alleges that these proceedings were instituted in retaliation against her because of her race, sex, and assoicational [sic] activities with the American Civil Liberties Union in violation of the first and fourteenth amendments of the constitution of the United States.

7. Respondent alleges that Rule 4 of the Rules of Disciplinary Procedure of the South Carolina Supreme Court are vague and overbroad in violation of the first and fourteenth amendments of the Constitution of the United States.

WHEREFORE, having answered the complaint respondent prays that the same



be dismissed.

Respectfully submitted,

s/Laughlin McDonald  
Laughlin McDonald  
52 Fairlie Street, N.W.  
Atlanta, Georgia 30303

Epstein, McClain & Derfner  
P.O. Box 608  
Charleston, South Carolina  
29402

Of Counsel:

Melvin L. Wulf  
22 East 40th Street  
New York, New York 10016

Charles Morgan, Jr.  
410 First Street, S.E.  
Washington, DC 20003

[Submitted to Supreme Court of South Carolina in Motion to Supplement Record, dated October 18, 1976. These materials were part of the records of the Commission on Grievances and Discipline but had not been included when the record was certified to the Supreme Court of South Carolina on September 23, 1976.]

March 17, 1975

John W. Williams, Esq  
1600 St. Julian Place  
Columbia, S.C. 29204

Re: Williams v. Smith

Dear Mr. Williams:

Thank you for your reply to my letter of March 12 concerning previous opinions of the Board. However, I think that perhaps you misunderstood my request. I have already studied the decisions of the South Carolina Supreme Court regarding solicitation, including the Crosby case that you mentioned. We did not request citations, but properly excised panel reports. The information I am seeking is the opinions, reports, and/or findings of the Board of Commissioners or panels thereof, on cases that have not been referred to the Supreme Court, which is available only from the

Board's files. I have reason to believe, from my recollections of a speech made here in Charleston by Camden Lewis and from informal discussion with attorneys who have represented clients before the Board, that there must be a number of such opinions, reports, and/or findings. I would think that even if such reports are not indexed, the staff recalls the most important reports regarding solicitation. With that clarification, we renew the request in my earlier letter.

Very truly yours,

Ray P. McClean [sic]  
Attorney at Law

RPM/ch

cc: Laughlin McDonald, Esq.  
52 Fairlie St., N.W.  
Atlanta, Ga. 30303

[See explanatory note, supra, A21.]

THE SUPREME COURT OF SOUTH CAROLINA  
THE BOARD OF COMMISSIONERS ON GRIEVANCES  
AND DISCIPLINE

March 21, 1975

PERSONAL AND CONFIDENTIAL

Mr. Ray P. McClain  
Attorney at Law  
Post Office Box 608  
Charleston, South Carolina 29402

Dear Mr. McClain:

I am a great admirer of any lawyer who keeps the "other side" off balance. Please note your letter to me of March 17, 1975, which contains two different spellings of your last name. This is a new one on me but very effective.

Even though we do not file in my office by subject matter, I have reviewed my file cards in an effort to determine if there are any cases in my possession which have arisen since my connection with the Board involving solicitation and I beg to advise that I find none other than the Crosby case. I am sending Cam Lewis a copy of this letter and yours so that if he remembers any such cases, he can call them to my attention and I will be

happy to remove all names and send you  
copies of whatever we might have.

Sincerely,

s/ John W. Williams  
John W. Williams

dpg

cc: Mr. Camden Lewis

Mr. Laughlin McDonald, Attorney at Law

[See explanatory note, supra A21.]

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

BEFORE THE BOARD OF COMMISSIONERS  
ON GRIEVANCES AND DISCIPLINE

In the Matter of:	)	
	)	<u>SUBPOENA AND SUBPOENA</u>
Anonymous,	)	
	)	<u>DUCES TECUM</u>
Respondent.	)	

TO: HERBERT E. BUHL, III, ESQUIRE  
Attorney at Law  
2016 1/2 Green Street  
Columbia, South Carolina

We command you, that all and singular  
business and excuses being laid aside, you  
appear and attend before the Board of Com-  
missioners on Grievances and Discipline in  
Room 210 on the second floor of the Supreme  
Court Building, Columbia, South Carolina,  
at 10:00 AM, Thurs, Mar. 20, '75 to testify  
and give evidence in the above captioned  
matter on behalf of the Complainant and  
that you bring with you and produce the  
following records and information:

All accounts, books, or other finan-  
cial records of the Carolina Commu-  
nity Law Firm and the firm of Buhl,  
Smith and Bagby during the years



1973 and 1974, pertaining to the financial arrangements of those firms with the American Civil Liberties Union, the ACLU Foundation, Inc., and any affiliate organizations.

If you refuse or neglect to obey this Subpoena, to attend, to be sworn, or to affirm, to answer any proper question, or to produce the requested documents you shall be deemed in contempt of the Supreme Court of South Carolina and punished accordingly.

s/ Edward M. Royall (SEAL)  
Member, The Board of Commissioners on Grievances and Discipline.

[Jurat and acceptance of service omitted in printing.]

IN THE SUPREME COURT OF SOUTH CAROLINA  
FOR THE BOARD OF COMMISSIONERS ON  
GRIEVANCES AND DISCIPLINE  
BEFORE THE PANEL MEMBERS

In the Matter of:

John W. Williams, Secretary )  
of the Board of Commissioners )  
on Grievances and Discipline, )

Complainant, )

-vs-

Edna Smith, )  
Respondent. )

PANEL MEMBERS:

JOHN B. MCCUTCHEN, Esq., P.O. Box 647,  
Conway, South Carolina, Chairman of the  
Board.

H. HAYNE CRUM, Esq., P.O. Box 97, Denmark,  
South Carolina.

MELVIN B. MCKEOWN, Esq., P.O. Box 299,  
York, South Carolina.

\* \* \*

[1] The following proceedings were held in the South Carolina Supreme Court Building, Room 210, on March 20, 1975, commencing at 10:00 o'clock a.m. before Panel Members of The Board of Commissioners on Grievances and Discipline.

\* \* \*

[4]

MR. MCCUTCHEN: I assume, Gentlemen, from the Respondent, that she is familiar with the charge that's contained in the Complaint?

MR. MCDONALD: That's correct.

MR. MCCUTCHEN: And specified in Paragraph Number 2?

MR. MCDONALD: Yes, sir, she has been served with a copy of the Complaint.

MR. MCCUTCHEN: You may proceed, Mr. Kale, if you are ready.

[Transcript continued on next page without omission.]

[4] MRS. MARIETTA WILLIAMS, a witness on behalf of the Complainant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. KALE:

Q. Mrs. Williams, would you please state your full name? A. Marietta Williams.

Q. Where do you live? A. Aiken, South Carolina.

Q. Okay. Mrs. Williams, I would like to direct your attention to the year 1973. Do you know a Dr. Pierce? A. That's my doctor.

Q. That's your doctor? A. Yes, sir.

[5] Q. And did Dr. Pierce perform an operation of any manner? A. He did.

Q. What type of operation was that?

A. A sterilization.

Q. Subsequent to this operation that was performed, were you contacted by members, or member, or persons associated with the American Civil Liberties Union?

A. After the operation was performed, it was in July, Edna Smith, that's who she said she was.

Q. Edna Smith? A. Right.

Q. Is this Edna Smith that contacted you? A. Yes, it is.

Q. Please let the record point out that she identified the Respondent as Miss Edna Smith, the person who had contacted her.

Q. Mrs. Williams, can you relate to us the circumstances of her contact with you? A. Well, it was like this; I was coming from Aiken County Hospital, which my baby was in the hospital, he was dehydrated. And I was coming from the hospital and I met Mr. Gary Allen. And he said I was just the person he was looking for. I said, "What do you mean?"

Q. Now, can I just stop you here? Who is Mr. Gary Allen? A. That is the man that taken me to his trailer where I met [6] Edna Smith at.

Q. Okay, go ahead, please. A. Well, I got in the car and we went over to his trailer and that's when I met Miss Edna Smith.

Q. Okay. A. And they were telling me about I could sue Dr. Pierce for sterling [sic] me, for the operation.

Q. Okay. Now, do you recall the exact date this occurred on? A. I can't

recall the exact date. I know it was in July, the last portion of July.

Q. Of 1973? A. Right.

Q. Okay. Do you remember more exactly what the conversations were?

A. Well, yes, they were talking about it was unfair, you know, that the women should have their own rights or whether they wanted to be sterile or not, and that the doctor was not right.

Q. The doctor you are talking about is -- A. Dr. Clovis H. Pierce.

Q. He is your family doctor? A. No, he is my doctor that delivered my kids for me.

Q. Did Miss Smith talk to you about bringing a legal action against the doctor?

A. Yes, she did. And she also sent me the letter.

[7] Q. Okay, we will get to that in just a moment. Now, did Miss Smith fully advise you of your rights? A. Yes, she advised me of my rights.

Q. Did she tell you that you could get any money damages, or anything? A. Well, yes, she said if I brought a suit against Dr. Pierce that I could get money.



Q. Did she say she wanted to bring the action for you? A. Yes.

MR. MCCLEAN[sic]: Mr. Chairman, I would have to object to the constant leading of this witness.

MR. MCCUTCHEN: Yes, don't lead the witness.

Q. (By Mr. Kale) What did she tell you she wanted to do for you? A. Well, she explained to me my rights. And she also stated that if I brought a lawsuit I could get money, that she would be my attorney.

Q. What did you tell Miss Smith that you wanted to do? A. At the time I told her I didn't have time to be bothered with that because I had a kid in the hospital they were looking to die, that I didn't have time for that, that I would contact her some more. That's when she sent this letter to me. And I called her right there in the office.

Q. Okay, now, let's slow up. Did you tell her under what circumstances you would bring a suit against Dr. Pierce? [8] A. Yes, I did, when I called and talked to her I told her that I would sue Dr. Pierce if I got pregnant again.

Q. Did you tell her that at the time you were meeting her at the trailer?

A. No, at the time I didn't know what was going on because I had my mind on my kid.

Q. Mrs. Williams, were you contacted by people from the ACLU in November of 1974? A. From who?

Q. Concerning making a statement? A. From the who?

Q. Did Mr. McDonald contact you? A. Yes, he did.

Q. Did he ask you to make a statement in this matter? A. Yes.

Q. Did you make a statement? A. Yes, I told him I wasn't going to sue.

Q. Do you recall if you made a statement, at that time, do you recall if you made a statement that you told Miss Smith, at that time, that you did not want to bring a lawsuit? A. Yes, I recall that.

Q. You did make that statement? A. I did make that statement.

Q. And that was in July of 1973, that you allegedly make a statement?

[9] A. Right.

Q. Can you recall what you said in your affidavit? A. Well, I think I said that I would not sue Dr. Pierce unless I got pregnant again; then I would bring a lawsuit.

Q. And this was in July of 1973?  
A. 1973.

Q. Were you in contact with Miss Smith at any time from the July meeting until you received the letter from her?  
A. No, I wasn't.

Q. You made no contact? A. No.

Q. Did she make any contact? A. No, she didn't until she sent the letter which was August 30.

Q. Now, do you have a copy of that letter here? This is a copy of that letter that you received? A. From Edna Smith.

MR. KALE: We would like to introduce this into evidence.

\* \* \*

[10] MR. MCCUTCHEN: The Panel will let the letter in. Your objection is in the record and you are protected. Let the Court Reporter mark it in evidence.

(Thereupon Complainant's Exhibit C-1 marked in evidence, letter dated

August 30, 1973, from Edna Smith to [11] Mrs. Marietta Williams)

Q. (By Mr. Kale) Mrs. Williams, what was the date that you received that letter? A. August.

Q. August? A. No, it was in September when I received the letter. It was mailed out August 3rd. I would say it was August the 2nd or 3rd, something like that. I mean, September 2nd or 3rd, somewhere along there.

Q. And I believe your testimony was you had no contact in between these times?  
A. No.

Q. What did you do after you received that letter? A. I carried it to my attorney.

Q. Did you subsequently contact Miss Smith? A. Yes, I did. I called her at the office and I told her I didn't want any part, that I wasn't suing anybody because it didn't make much sense. And I told her that the only way I would sue, bring a lawsuit against Dr. Pierce is that I did get pregnant.

MR. KALE: Okay. I have no further questions.

## CROSS EXAMINATION

## QUESTIONS BY MR. MCDONALD:

Q. Mrs. Williams, where were you born? A. Aiken, South Carolina.

[12] A. And how long have you lived there? A. All my life until about a year ago.

Q. You testified, I believe, in response to a question, that you had moved. Is that a move within the city? A. Yes. My grandmother, she had moved from Sumter Street to Carver Terrace and I wasn't here then, I was in Florida at that time. And I have been around, you know, originally since them.

Q. What sort of schooling have you had? A. I went to the ninth grade.

Q. And have you had any regular employment? A. Yes, Continental Marking, I was operator there.

Q. I'm sorry. A. Continental Marking.

Q. What were your duties at the Market? A. Operator.

Q. Operator? A. Telephone operator.

Q. And what sort of employment did you have before? A. Well, \$63.00 a week.

Q. What sort of work was that?  
A. It was on the telephone calls, different,

just an operator.

Q. You have been married. Are you presently married? A. I am presently married.

Q. And do you have any children?

[13] A. Three.

Q. Where are they at the present time? A. My grandmother have the two oldest kids.

Q. Were you ever involved in any custody proceedings over your children? A. Yes, the three. In fact, the welfare have custody of the baby. My grandmother have custody of the two older kids. But since me and my husband are gone back together we have custody of all of them.

Q. Can you tell me why you lost custody at one time? A. Yes. At one time --

MR. KALE: I'm going to object. I don't know what the relevancy of all this is.

MR. MCDONALD: Well, I'm going to attempt to join it up. I think it will go to the competency.

MR. MCCUTCHEN: Well, what is the purpose of it, Counsel?



MR. MCDONALD: Well, it would go to the competency of the witness, I believe, Sir. I think that would permit me at some point --

MR. MCCUTCHEN: Well, your position is that the question of her custody affects her credibility?

MR. MCDONALD: Right.

MR. MCCUTCHEN: In what way?

MR. MCDONALD: I think there might have been a [14] finding of the general incompetency and I think that would go to the weight her testimony ought to be given by the Panel.

MR. MCCUTCHEN: I think the finding would be the best evidence, if there is such, and I'm not sure that that affects the matter of credibility.

MR. MCDONALD: I think that we would be entitled to develop that.

MR. MCCUTCHEN: Do you have any indication that there has been some finding of incompetency or are these just a series of general questions relating to this matter of custody?

MR. MCDONALD: Your Honor, it's my understanding from conversations with the witness that the children have been taken

away from her by the Department of Public Services. So I wanted to establish whether or not there was an adjudication or finding that she was not fit to care for them.

THE WITNESS: No, sir, it wasn't.

MR. MCCUTCHEN: Well, I don't see that this has any bearing on the question of credibility. If you have some finding of some proper court proceeding that touches the matter of credibility, that's another matter, but I don't believe this --

MR. MCDONALD: All right, sir. Let me ask the witness, if I may, if she has even been committed to any [15] institution, for example the State Hospital here in Columbia?

THE WITNESS: Well, no.

MR. MCDONALD: Have you ever spent any time in the State Hospital?

THE WITNESS: Yes, in 1970.

MR. MCDONALD: Can you tell me the circumstances --

MR. KALE: I'm going to object again. He says he hasn't had any findings. I don't see what relevance this has either.

MR. MCDONALD: Well, I have got a right to ask the witness about this whole thing.

MR. MCCUTCHEN: We are going to permit him to proceed for the time being with reference to admission and subject to the objection of the Attorney General.

MR. MCDONALD: Could you explain that?

THE WITNESS: Yes. In 1970, I had just come out of the University Hospital in Augusta, Georgia, which I stayed there a period of three months. I had been in a terrible accident and I couldn't walk. And I thought that I never would walk. And I tried to take -- took an overdose of my pills and that was all the reason why I had to stay in the hospital. I stayed in there a period of thirty days and I asked them did I have to discuss that I had ever been in the State Hospital and they told me no I had a complete [16] discharge as through [sic] I had never been in the State Hospital.

Q. (By Mr. McDonald) All right, now, Mrs. Williams, I believe you testified that you had a conversation with a Mr. Gary Allen about a meeting and you went to that meeting and met Miss Smith there, is that correct? A. Yes.

Q. Now, could you tell me, please, what Mr. Allen said to you about it? A. He just told me that I was the person that he wanted to see. And I said, "About what?" He said, "Wasn't Dr. Pierce your doctor?" I told him, "Yes." He said, "Well, didn't he operate on you?" I said, "Yes, he did." He said, "Well, you come on down here to my office because there are some people down here that would like to talk to you." I said, "What kind of people, look, I don't have time to be bothered because I got a baby in the hospital and they look for my baby to die and I ain't got time for this kind of mess." He said, "There was some attorneys there and would like to see me and would like to represent me in suing the doctor for money." I said, "What the doctor did?" He said, "Because the doctor sterilized [sic] you, you cannot have any more kids." And I said, "Yes, I know that, I know that, he explained that to me before I even signed the paper."

Q. Well, why did you go to that meeting? [17] A. To see what it was all about, me and my grandmother was together.

Q. Did Edna Smith, in any way, get you to go to that meeting? A. I didn't even see her until I got there.

Q. You went on your own free will and accord at Mr. Allen's request?

A. Right, at his request.

Q. Did anybody force you to go there? A. No, nobody didn't force me.

Q. Who else was at that meeting?

A. Barbara Page, Gary Allen, Edna Smith, and I think Dorothy Waters, she was there, also. And it was some more people there, I wasn't paying attention to everybody.

Q. Now, you say Edna Smith was there. Tell me what sort of conversation you had with her. Did she address the group generally or did she talk to you specifically? A. She addressed everybody. She told me who she was. And she explained what it was all about, about she would represent me in suing Dr. Pierce. Well, I didn't understand because, like I stated then, that I had a baby in the hospital that I was worried about my child's life and I wasn't hardly interested about suing anybody.

Q. Were you free to leave, at any time, during that meeting? A. Yes.

Q. Did anybody attempt to say you had to stay there? [18] A. Nobody can't make me do nothing.

Q. Now, these statements that Edna Smith made, were they made to the group as a whole or you individually? A. She just talked to me directly.

Q. Well, were you present with everybody in the room during this -- A. Yes, I was in the room but everybody, you know, they had their own conversations going.

Q. Right. A. And I was sitting by her.

Q. But there were other people in the room there. A. Yes, but she was talking to me directly.

Q. Who else was there other than the people from Aiken, and Edna Smith?

A. There was some white people there with cameras.

Q. Do you know who they were? A. No, I don't.

Q. Did you have any conversation thereafter with Mr. Gary Allen? A. No, I didn't.

Q. You don't recall whether or not you told Mr. Allen to get in touch with --



A. I know I ain't told him to get in touch with her.

Q. Let me finish my question. Did you ask Mr. Allen to get in touch with somebody to represent you to bring a suit against [19] Dr. Pierce? A. No. I didn't.

Q. Did you have any conversations with Mr. Allen following that first meeting? A. No, I didn't.

Q. Now, did you have any conversations with Edna Smith following that meeting and before you got that letter? A. No.

Q. You never talked to her on the phone? A. No, not until I called her after I got the letter.

Q. Now, tell me what happened, if you will, when you went to see your lawyer after you got that letter. Was that your testimony? A. Yes.

Q. Tell me, in point of fact, you went to see Dr. Pierce for one of your regular checkups, isn't that correct? A. Yes, I did.

Q. And was anybody there with Dr. Pierce? A. Yes, my attorney.

Q. It was your attorney? A. We have the same attorney, Attorney Johnson.

Q. Who was that attorney that was at Dr. Pierce's office? A. B. Henderson Johnson, Jr.

Q. And your testimony is that he had represented you prior to that time? [20] A. Yes.

Q. In what connections? A. About my kids.

Q. About your children? A. Yes.

Q. Explain to me what you mean by that.

MR. KALE: Objection, Your Honor, I don't know where we are getting into an attorney-client privilege here between Mr. Johnson and Mrs. Williams, I don't know what he intends to pursue in this manner.

MR. MCDONALD: Well, it would be her privilege.

THE WITNESS: Well, I don't think that what I had to talk to Mr. Johnson about, I don't think I have to tell you about because I don't think that's why I come here or nobody didn't tell me that's what I was coming here for.

Q. (By Mr. McDonald) Does Mr. Johnson presently represent you in connection with -- A. Yes, he do.

Q. -- in any matter that arises out of the matter that is presently before this Panel? A. No, he don't have anything to do with what's going on here.

MR. MCDONALD: I believe the privilege will be improperly invoked under the circumstances, and I request that the witness answer my question.

MR. KALE: I don't see the relevance either.

[21] MR. MCCUTCHEN: I don't think it's relevant, Counsel, and the Board feels it's neither germane to this issue.

MR. MCDONALD: I believe it's relevant because we allege that the Complaint in this matter was not [sic] instituted in bad faith. And I would intend to tie the testimony up here and show that Mr. Johnson is one of the attorneys involved in Doe v. Pierce and that he actually received a copy of this letter approximately twelve months before the Complaint was filed in this matter. And we believe that shows that after the Complaint was filed in Doe v. Pierce, and we believe that shows that was an initiation of the Complaint to retaliate against the roll [sic] which Miss Smith may have played.

MR. KALE: May it please the Panel, I'm not sure I understand. I'm not sure he is saying the Board of Grievance and Discipline brought this matter in bad faith. I don't see what that has to do with Mr. Johnson. I don't see the relevancy of this.

MR. MCDONALD: What we mean is the effect is that the letter was forwarded to the committee and whereby initiation, that's what I mean, I don't suggest that this Panel did that.

MR. MCCUTCHEN: Counsel, the feeling of the Panel is that it is entirely too remote and we sustain the [22] objection.

MR. MCDONALD: If I may just make an offer of proof on that point; and that would be that Mrs. Williams went to see her doctor for one of her regular scheduled check-ups immediately after she received the letter from Edna Smith.

MR. KALE: May I interject this. I don't want to interrupt your offer --

MR. MCDONALD: Well, you are.

MR. KALE: We went through the same matters in Federal Court and in Federal Court they raised the same motions or statements of bad faith and it was dis-

missed by the Federal Court. Now, I don't believe that it's necessary to bring these matters up again. This was a part of the suit of Jane Coe [sic], the ACLU versus Harry Bozardt and others. It was dismissed by the Federal Court at that time. I don't think it's relevant here. We have maybe an issue of collateral estoppel [sic]. Again I don't see the purpose of going into this matter.

MR. MCCUTCHEN: Well, I think at this stage of the proceedings -- who is this?

MR. MCDONALD: He is a potential witness.

(Thereupon a witness was excused from the room)

MR. MCCUTCHEN: I think the Panel is of the opinion that, at this stage of the proceedings, solely for [23] the purposes of making your offer of proof you may, within a limited degree, put this in the record. But, I think at this stage of the proceeding, I should make the feeling of the Panel perfectly clear that Counsel on both sides; and that is, that in the nature of this proceeding we are not going to litigate today and get

into this record the matters that have been thrashed out before Judge Chapman in your proceeding in the Federal Court. Now, within that limited area we would let you tender, for the purpose of your proof, in this limited degree what you have proceeded to ask. But we are not going to litigate the matters that have already been litigated --

MR. MCDONALD: Let me say for the record that nothing has been litigated in the Federal Court. Judge Chapman abstained on the grounds of Young [sic] v. Harris. Nothing was litigated in the Federal Court. The Complaint was dismissed without any hearing on the merits without any testimony so we are not attempting to relitigate the thing at all.

MR. MCCUTCHEN: I understand that.

MR. MCDONALD: Would it be the Panel's wish that I make my offer of proof?

MR. MCCUTCHEN: Yes.

MR. MCDONALD: We would show that Mrs. Williams went to see her doctor for a regularly scheduled check-up [24] almost immediately after she received a letter from Edna Smith, and that at that check-up she was met by Dr. Pierce and Dr. Pierce's



attorneys [sic], Mr. B. Henderson Johnson from Aiken, and further more that Mr. Johnson had never, prior to that time, represented the witness in any capacity; that as she went into Dr. Pierce's office Mr. Pierce's attorney, Dr. Pierce's attorney, said words to this effect, I understand you have talked with Edna Smith, that you intend to bring a lawsuit against Dr. Pierce whereupon Mrs. Williams disclaimed any such intention and stated her child was about to die from dehydration, that that was her only concern, that she was not interested in bringing a lawsuit; whereupon Mr. Johnson had her execute a waiver in favor of Dr. Pierce of any liability for her sterilization and instructed her to telephone Edna Smith from Dr. Pierce's Office and tell her, Edna Smith, that Mrs. Williams didn't want to sue anybody, and she did that. So that would be what we would establish through the testimony of this witness and also Mr. Johnson.

Q. (By Mr. McDonald) Mrs. Williams, let me hand you a document and ask you, if you will, to identify that for me.  
A. Yes. I think I told you this, or somebody.

Q. What is that? A. Where I stated that I did meet Edna Smith. She did not try to persuade me or in any way bring a lawsuit, she didn't [25] try to tell me, you know, for some fee or something.

Q. Is that your testimony now? A. Yes.

Q. Did you read this? Is this, in fact, an affidavit which you executed there on the date bearing the date of November 7, 1974? A. Ain't but one thing wrong with this evidence, where it say at Mr. Johnson's request. He didn't request me, I asked, you remember, I think I told you, I asked him could I use a telephone to call Edna Smith.

Q. Is this, in fact, this document an affidavit which you signed on November 7, 1974? A. Yes.

Q. And prior to signing this statement, or this affidavit, did you read it over? A. Yes, I have read it over.

Q. And did I, in fact, read it to you prior to your signing it? A. Yes, you did. I haven't paid no attention to this part, at Mr. Johnson's request, she notified Edna Smith using Dr. Pierce's

phone. He didn't request that I call her. I asked was there a phone there that I could use. I think I told you that, remember I told you that? Didn't I tell you that in the car?

Q. Is that the only part of the statement that you say is incorrect, the affidavit? [26] A. No, no. Everything else is right. I did say Edna Smith did not attempt to persuade or pressure me to file this lawsuit.

Q. And you say here in your statement that she didn't offer to represent you for a fee or otherwise, is that correct? A. She didn't offer to represent me for no fee.

Q. Or otherwise? A. Yes.

Q. And will you tell me whether or not you made any notations on that statement yourself? A. About what?

Q. Well, for example, did I spell your name correctly? A. No, you didn't. I think I read it and you had Marietta.

Q. And did you change that yourself? A. Yes, I did.

Q. And will you tell me whether or not you wrote in the name of one of your children there? A. Yes, you did it.

Q. And you wrote that in yourself?

A. Yes.

Q. Was there anybody present when you executed this affidavit? A. You.

Q. And other than me? What about Mr. Gary Allen, wasn't he there? A. Talking about I can't change this around?

[27] Q. That's right. A. He was in the car, he was in the back seat.

Q. Will you tell me whether or not we had a conversation prior to the time that I saw you with Mr. Allen, on the telephone? A. Yes, we did, because you and Mr. Allen called me from his office, remember?

Q. And we talked on the phone? A. Yes, me and you talked on the phone and you said you wanted to see me.

Q. And did we go over the stuff that's in this affidavit, at that time, on the phone? A. Yes.

Q. Is that correct? A. Yes, I think we did go over it.

MR. CRUM: Will you clear up a question for us?

MR. MCDONALD: Yes, sir.

MR. CRUM: Who is Mr. Allen?



MR. MCDONALD: We will call Mr. Allen later. As you recall, Mrs. Williams testified that Mr. Allen arranged the meeting or called her to it and that's who that gentleman is. He was the gentleman who was here. We would like to -- I don't know whether it's appropriate on cross examination to offer this into the record but we either do so at this time or reserve the right to do so.

MR. KALE: I would ask what purpose he is introducing [28] the affidavit since he is here today to testify.

MR. MCDONALD: Well, it's the witness' statement.

MR. KALE: Well, he can bring that out on examination.

MR. MCKEOWN: Do you intend to show that she has made any inconsistent statements in the affidavit?

MR. MCDONALD: Well, sir, she has stated that Edna Smith did not attempt to persuade or put pressure her to file a lawsuit or offer to represent her for a fee or otherwise. She also explained fully the circumstances of the meeting.

MR. KALE: If it please the Panel, this appears to be an affidavit which

Mr. Mac Laughlin drew up, we don't know when or where or how, which he offered to Mrs. Williams to sign without benefit of any separate counsel herself on exactly what the language means or what it purports to mean. I'm not completely satisfied that she has the exact knowledge of the meeting [sic] of the language that this attorney has drawn up. She is here today to testify and she can be asked questions. I don't see the relevance or the necessity of having an affidavit that the attorney for the Respondent drew up unless he is going to show it's inconsistent statements, and so forth.

MR. MCDONALD: Through all respects, she explained the circumstances under which we talked and which the [29] affidavit was drawn. We talked on the telephone and she stated that we discussed the matter. And I went down with Mr. Allen, an independent witness who will corroborate [sic] this. She explains that I read the statement to her, that she read it, that she understands it.

MR. MCCUTCHEN: Well, if you have some part of it that you feel is inconsistent, I think you have a right to ask her about the inconsistencies, but unless there is



some differences in her testimony presently and what she relates in the sworn affidavit, I don't think, otherwise, the affidavit really is of any significance. Now, if you have some contradiction or inconsistency you may proceed to develop the inconsistency by questioning from the affidavit, but otherwise I don't think the affidavit is such, particularly since the witness is here under oath and testifying and subject to your cross examination.

Q. (By Mr. McDonald) All right, Mrs. Williams, let me hand you that document, if I may. In the first paragraph of that document, it states -- let me read it to you, it says, "Marietta Williams --

MR. MCCUTCHEN: Counsel, let us ask that you simply identify it for the purpose of the record. If you will ask the Court Reporter to just mark your affidavit, then it can be identified. For identification only.

Q. (By Mr. McDonald) Let me ask the Court Reporter to mark [30] for purposes of identification the document which has been identified by Mrs. Marietta Williams and about which she has been testifying.

(Thereupon Respondent's Exhibit Number R-1 marked for identification)

Q. (By Mr. McDonald) Mrs. Williams, do you recall whether or not you called Edna Smith a second time? A. No, I didn't. I called her one time. What did I want to call her two times for?

Q. You don't recall whether you talked with her after you spoke in Dr. Pierce's Office? A. No.

Q. You have no recollection of calling her to say that you really hadn't made up your mind about --

MR. KALE: Objection. She has answered the question once.

Q. (By Mr. McDonald) Will you tell me, whether or not, at some point following your sterilization you had determined that you did want to bring a lawsuit against Dr. Pierce? A. Not but one time. I got tired of everybody aggravating me. Everyone was coming to ask me wasn't I going to sign to file a lawsuit. And after I had said a hundred times I didn't want to sue then I got the notion that maybe if I sue maybe they will leave me alone, I'm tired of being bothered.

[31] Q. And do you recall whether or not you told Mr. Allen that you, in fact, did want to bring a lawsuit? A. No, I ain't told him that.

Q. Did you tell anybody else that you did want to bring a lawsuit? A. Yes, I did, I told Attorney Johnson in his office one day, I told him, I said, "I'm really tired, tired, I get busy with my own problems because I have problems of my own. And the time I leave and get somewhere and think I'm settled down, then my mother will call or write me and tell me to come back to Aiken that there is something else done come up about this same mess. And I have to turn around and spend money coming all the way back. And I told him that I'm good mind to sue, maybe if I sue they won't be bothering me, I'm tired of it.

Q. All right. When you went to see Dr. Pierce, you say that you met with an attorney, B. Henderson Johnson? A. Yes.

Q. Had you requested that he be present? A. I didn't know that he was going to be there.

MR. KALE: May it please the Panel, I wonder if he is going into this matter Johnson as an offer of proof. I believe he has already made his offer of proof.

I don't see what the relevancy of matters with Mr. Johnson have to do with the particular question we have here this morning.

[32] I believe the Panel has said that they did not intend to go into these issues at this particular hearing.

MR. MCDONALD: I'm sorry, I don't understand that.

MR. KALE: The matters of Mr. Johnson.

MR. MCDONALD: Did you say that the Panel indicated they did not?

MR. KALE: My understanding was from what Mr. --

MR. MCDONALD: I though you indicated that the Respondents, I'm sorry.

Q. (By Mr. McDonald) Let me ask you, if I may; you testified about this letter which has been introduced into evidence. And you state that the original of that letter was lost. Will you tell me how you got a copy of that letter which you brought with you? A. From my Attorney Johnson because I had already -- when I carried the original letter to Dr. Pierce's Office I asked Mr. Johnson would he get a copy of that original letter. And he asked me would I leave it by his office and I told him yes I would. I went by his office and left it.



Q. I see. And did you get the original back from him? A. Yes, I did, I got the original back from him.

Q. And he maintained the copy for you? A. Yes.

Q. And you had to get a copy from him for the purpose of this hearing? [33] A. Right.

Q. Now, give me the date, if you will, when you went to see Dr. Pierce and talked with Mr. Johnson? A. When I went back for my six weeks check-up.

Q. That would have been in August 31, 1973, or in September, '73? A. August.

Q. And that's when you showed the letter to the lawyer? A. Right.

Q. Mrs. Williams, I have just one more question for you. Do you recall whether you stated to me, in the presence of Mr. Alled [sic], that you might want to sue Dr. Pierce as far as your sterilization? A. I think I did state that in front of Mr. Allen, remember that day? Why, because I was cooking that day and I stated to you, I said, "Well, I'm tired of this mess, and I said maybe if I sue, if I sue they will leave me along [sic]." And that's when I said, "I think I will sue

so they probably will leave me alone." Remember I stated that when Mr. Allen was in the back seat of the car?

MR. MCDONALD: Thank you.

REDIRECT EXAMINATION:

QUESTIONS BY MR. KALE:

Q. Mrs. Williams, do you know what time it was that you made that statement he just referred to, what month? [34] A. It was in November, I think, in the afternoon but what time I couldn't tell.

Q. Okay. What I meant, was the month? What year? A. '74.

Q. 1974? A. 1974.

Q. This was approximately a year after you originally saw these -- A. Right.

Q. -- people in the trailer? A. Right.

Q. Mrs. Williams, did Miss Smith talk to you extensively about your rights, your legal rights, in this matter of the sterilization at the time she talked to you in the trailer? A. Could you be more specific?

Q. Did she advise you of your legal rights? A. Well, yes.

Q. At the time you talked to her in the trailer? A. Yes, she did.



Q. Did she say that she would represent you? A. She did state that I could get money.

Q. That you could get money? A. She did state that I could get money.

MR. KALE: I have no further questions.

RE CROSS EXAMINATION:

QUESTIONS BY MR. MCDONALD:

[35] Q. In the statement which you just looked at, you state, paragraph 4, that Edna Smith did not, however, attempt--  
A. She said I can get money, I didn't say her, she said me, --

Q. And you say -- A. -- and I was the one supposed to be suing the doctor for the money.

Q. All right, but you said in your statement in Paragraph 4, did you not, that Edna Smith did not attempt to persuade or pressure her to file a lawsuit or to represent her for a fee or otherwise. That is still your testimony? A. That's right.

MR. MCDONALD: Thank you.

MR. KALE: I have just one more question to follow this up.

REDIRECT EXAMINATION:

QUESTIONS BY MR. KALE:

Q. Do you understand what otherwise means? A. No, I don't.

Q. Did she state that she would represent you without fee? A. Well, yes, she did state that. She said that she would represent me without a fee, be my attorney.

Q. But she did say she would represent you? A. Yes, she said that in front of everybody, me and my grandmother.

RE CROSS EXAMINATION:

[36]

QUESTIONS BY MR. MCDONALD:

Q. Was it perfectly clear to you that Edna Smith had no financial interest in your case personally? A. Yes.

Q. That was never a question that she was after financial gain? A. Well, yes --

MR. KALE: Object, I don't know if she is in a position to say what Edna Smith was out for. I think that's a conclusion on her part and I would move to strike that.

MR. MCDONALD: I think she can certainly talk about the discussion they had.

MR. KALE: She can talk about specific discussion but that's a conclusion upon her part.

MR. MCCUTCHEN: I think the objection is well taken. She can relate what the Respondent told her but any matters of opinion I don't think are proper.

MR. MCDONALD: All right, Sir.

Q. (By Mr. McDonald) There was no discussion between you and Edna Smith about her getting a fee for anything she might do for you? A. No.

Q. Let me ask you a question, Mrs. Williams. Do you think that anything that Edna Smith did in her dealings with you deminished [sic] -- well, let me just strike that question.

MR. MCDONALD: Thank you, very much, Mrs. Williams.

[37] MR. KALE: I have no further questions.

EXAMINATION:

QUESTIONS BY MR. MCKEOWN:

Q. Mrs. Smith, who is Gary Allen -- excuse me, I mean Mrs. Williams. A. Well, all I know is he is just a man.

Q. Where does he work? A. He has got a car lot, I think.

Q. He runs a car lot in Aiken? A. Yes.

Q. Is that his only employment. A. Well, I don't know. I mean, as far as I know, he has that car lot.

Q. How did you know him before the time you say he had some people he wanted you to talk to? A. Well, I had been knowing Mr. Allen -- see, my grandmother knewed all about him from childhood and I always have known him because he has been a friend of my family for years.

Q. Have you ever sought his advice about any matter, particularly a legal matter? A. No, I never had, I never contacted him.

Q. Had he ever sought you out to give you any advice about what your legal rights were and what you ought to do about any legal situation? A. No.

[38] Q. Where were you when you saw him on this occasion? A. Me and my grandmother had just left Aiken County Hospital up by the Soc Service Station going straight down Richland Avenue -- but anyhow, it's a service station.

Q. Did you approach him or did he approach you? A. He approached me and told me I was just the one he wanted to see.

Q. Did you go with him, at that time? A. Yes, I did.

Q. Did he tell you for what purpose he wanted you to go? A. Yes, he told me that some people was there that would like to see me and talk to me.

Q. Did he tell you any of them were attorneys? A. Yes.

Q. Did he tell you what they wanted to talk to you about? A. Yes, he did.

Q. What did he tell you? A. About Dr. Pierce and the sterilization.

Q. And you went with Mr. Allen? A. Yes.

Q. To where? A. To his trailer, and it's an office, you know, in his trailer.

Q. This is on the car lot? A. Yes, it is.

Q. And when you arrived there, Miss Smith was already there? [39] A. Yes, she was.

Q. Did she have any specific conversation with you other than the group?

A. No, she was talking to the whole group of people, there was more than one there, also Mrs. Barbara Page, a lot more of the people were there.

Q. Do you know who invited that group to his trailer? A. No, I don't know.

Q. What did Miss Smith tell you at this meeting? A. Well, she told me that it was unfair what Dr. Pierce was doing, and she was telling me that she could advise me about I could bring a lawsuit and get money for what he had done. I did state that I didn't know what was going on and I didn't have time to be bothered with it because I had a kid in the hospital that they were looking to die and I had to leave as early as I could.

Q. At this meeting who first brought up the possibility of a lawsuit, you or Miss Smith? A. Miss Smith was the one telling me about it.

Q. Had you had any thought about a lawsuit before this time? A. No, I hadn't.

Q. Did you have an attorney, at that time, that you considered to be your family attorney? A. No.



Q. Had you had any need for the services of an attorney before [40] that time for anything? A. No.

Q. Had you ever been involved in any matter that you had used an attorney for?

A. No, I haven't.

Q. No one had represented you or rendered any legal services to you prior to this time? A. No, I never had needed it.

Q. Do you have someone you consider to be your attorney at the present time?

A. Yes, Attorney Johnson.

Q. What is his full name? A. B. Henderson Johnson, Jr..

Q. All right. And who is Dr. Pierce's attorney? A. The same attorney.

Q. You and Dr. Pierce then had the same attorney? A. Same attorney.

Q. Did you discuss this matter with Mr. Johnson? A. Well, no, I just explained to him that I didn't want no part in it and that I just wanted to close the subject. So --

Q. When you talked to Mr. Johnson, when and where did you have this conversation that you had with Mr. Johnson when you told him that you didn't want any part of a lawsuit? A. Well, that next day after

I got that letter from her. And [41] I had carried it to Dr. Pierce's Office and I told him, I said, "I was --["]he said he was going to make a copy of the original letter. And I went to his office that next morning and picked that, you know, that copy up, what I gave you. And I talked to him and I told him that I didn't want anything else to do with it.

Q. At the time that you talked to him, then, did you consider him to be your lawyer? A. No, not right then, it was later after my kids were taken home when I attempted to get him to be my lawyer.

Q. Did you go to him for the purpose of asking his advice? A. I went to him. No, he didn't come to me, because I thought that's what a lawyer is supposed to do, wait til you go to him.

Q. And you were seeking his advice, at that time? A. Right.

Q. About a matter that you wanted to get his advice on? A. Right.

Q. Did you make any further contact with Miss Smith yourself after this meeting at the trailer of Mr. Allen? A. I did not other than calling her when I got that letter.

Q. When Miss Smith talked to you about the possibility of a lawsuit against Dr. Pierce, did she mention anything else besides money to you that would be gained by the lawsuit? A. No, she didn't, she just mentioned money that I could get.

[42] Q. Is that the only thing that she talked to you about? A. That's the only thing that I heard.

Q. Did she tell you anything about how much money she thought you could get or what she thought? A. No.

Q. Or what the possibilities were of making any recovery of any amount of money? A. No.

Q. Let me ask you this: You are how old at the present time? A. Twenty-two.

Q. What is your educational background? A. Nineth [sic] grade.

Q. After you received the letter from Miss Smith, what course of action did you take? A. Well, I just looked at the letter and I said, I was going to seek an attorney and see if I could get more advice from. And when I found Attorney Johnson was there to Dr. Pierce's Office that day, I just wanted to let him see the letter.

Q. Did you tell him, at the time,

that you let let him see the letter that you did not want to start any lawsuit?

A. I told him before I ever received the letter that they had been talking to me about suing Dr. Pierce for sterilization. And I told him I wasn't interested in it, that the only way that I would sue Dr. Pierce was if and when I got pregnant again.

[43] Q. And that would be because of the sterilization didn't work? A. Right, and I still mean that.

Q. And that was the only thing that you were concerned about is whether you would be sterilized and not have --  
A. No more kids.

Q. Did Miss Smith tell you why she wanted to represent you in a lawsuit against Dr. Pierce? A. Well, yes, she said that she thinks that all the women there in Aiken should have their own freedom of whether they want to have any more children or not, and that a doctor shouldn't persuade them into sterilizing.

Q. Did you agree with what she was telling at that time? A. Well, no, because in my part I had my own rights, you know, like he had talked to me about it. About three months he talked to me about it.



Q. Did you feel that there was any reason, at that time, to sue Dr. Pierce?

A. No, I didn't.

Q. Do you, at the present time, feel that there is any reason to sue Dr. Pierce?

A. No, because I feel he don't make no woman come to him, and they shouldn't have something so that they can just go around here --

Q. All right. Did Miss Smith, at any time, tell you how this lawsuit would be handled; that is, how the expenses would be [44] paid or anything else of that nature? A. No, she did not, if she did, I can't recall.

Q. And the main thing she talked to you about was suing Dr. Pierce for money?

A. Money.

MR. MCKEOWN: All right.

#### EXAMINATION:

#### QUESTIONS BY MR. MCCUTCHEN:

Q. Can you tie down, specifically, the date that you say this first conversation took place when you and your grandmother were leaving the hospital? Do you remember exactly when this was or how long it was before you got this letter of August the 30th of 1973? A. If I'm not

mistaken it was a week before I got this letter.

Q. Your best recollection then is that a week before the 30th of August?

A. Nodded affirmatively.

Q. When the gentleman stopped you and indicated that there was some people that wanted to see you? A. Right.

Q. Do you remember when this child was in the hospital, the one that you say was seriously ill, was this in August or July? [45] A. He went in the hospital in July, about the last part of July. He was born June 22nd. He went -- no, about the middle part of July because he was dehydrated. That's the same baby that Dr. Pierce delivered.

Q. And how long was he in the hospital? A. He was in Aiken County Hospital one month. He stayed in Charleston Hospital two months.

Q. And it was how long after they put him in the hospital that you had this conversation with the gentleman from Aiken, Mr. Allen, how long had he been in the hospital? A. A week and a half. I said a week, when I seen Mr. Allen.

Q. Somewhere around a week or week and a half after he was admitted to the



hospital you had this discussion with Mr. Allen?

A. Right.

Q. Had you had any discussion of any kind with Mr. Allen prior to this particular one? A. No.

Q. You never talked to him about any type of business or problem that you had? A. No, I haven't.

Q. Exactly what did you tell them when you left Mr. Allen's Office that day?

A. I told him I had a baby to think of because my baby was in the hospital and that at the time I didn't have my mind [46] on suing nobody because I didn't have time to think about suing.

Q. You didn't give them an answer either way? A. No, I didn't. I did say that if I needed you all I will call you.

Q. And that's all you told them? A. Right, if I needed them.

Q. If you wanted their help you would let them know? A. That I would call them.

MR. MCCUTCHEN: Thank you, very much.

MR. MCDONALD: I have two questions, if I may.

RE CROSS EXAMINATION:

QUESTIONS BY MR. MCDONALD:

Q. I believe you testified that Edna Smith stated that in your judgment the practice of sterilization then being carried on in Aiken was wrong? A. Yes, because she -- she feel the women of South Carolina should have their own ability of deciding whether they want to have more children or not and no doctor shouldn't pressure them into being sterile.

Q. Is that one of the main things you talked about? A. Yes.

Q. Let me ask you this. Did Dr. Pierce tell you that in order to deliver your child you would have to agree to be sterilized?

[47] MR. KALE: I'm going to object to that.

MR. MCCUTCHEN: I think that's improper and I think it should be stricken from the record. I don't think that's germane at all.

[48] MR. KALE: May it please the Panel, we have subpoenaed Mr. Herbert Buhl and we have asked him to bring certain documents along with him to this hearing. I would like a slight recess

for maybe fifteen minutes so I can see these documents that he has brought along and examine them if that's admissible with the Panel.

MR. MCCUTCHEN: All right, sir.

(Recess)

MR. MCCUTCHEN: All right, sir.

MR. KALE: I do have one thing that I would like to put in evidence and that's the Summons and Complaint in the case of Doe v. Pierce, for purposes of showing that the attorneys for Plaintiffs in that action did request attorney fees.

MR. MCDONALD: I see no reason for it to be in evidence, it's a public document. I object to that on the grounds of relevancy as well as the Court can take judicial notice of it.

MR. MCKEOWN: Do you also object to it on the grounds it is obviously a copy of the original?

MR. KALE: No, sir, we have the original.

MR. MCDONALD: No.

MR. KALE: We have a certified copy of it if I can find it.

MR. MCCUTCHEN: The Panel will accept it.

[49] MR. KALE: This is all involved in the Aiken Sterilization case and there were attorney fees asked for, so we feel solicitation of clients was for personal gain or, at least, for the ACLU's personal gain.

MR. MCDONALD: Well, on that ground we certainly would object since the ACLU is not the Respondent in these proceedings. There is no showing there has been any connection in that complaint.

MR. MCCUTCHEN: Let the record show that the Panel will receive [sic] it for whatever it's worth. Frankly, we have some misgivings about it but we will receive it for whatever value we think should be assigned to it.

(Thereupon Complainant's Exhibit number C-2 marked in evidence)

MR. KALE: At this point the Complainant would rest its case.

MR. MCDONALD: We would like to move that the Panel dismiss, strike or quash the complaint, whatever the appropriate phrase is, on several grounds. Number one is that the complaint fails to allege a violation of any disciplinary rule. There is no recitation, at any point in the complaint as to any specific provision of



any law that exists in the State or any Canon of Ethics in the disciplinary rule contained in the Canon of Ethics which the Respondent has allegedly violated. We contend that that's tantamount to [50] indicting someone for committing a crime in violation of the Code of Laws in the state, or in violation of one of the chapters in the Code. I think that we are clearly entitled to more specifics than that in that the complaint -- to use the civil analogy -- is demurrable on its face for those reasons. We contend that the only conceivable disciplinary rule that could be involved would be rule 2-103a. And it's perfectly clear from the testimony which Miss Williams has introduced that -- and from the letter which forms [sic] the basis of the charge, there could be no violation of that disciplinary rule. The letter does not recommend employment of any particular attorney, and it does not recommend that the respondent, or associates, assist her; in point of fact, the law suit which has been filed, as the Panel will see, conclusively demonstrates that Miss Smith was not involved in that lawsuit and did not accept any employment in connection

with it. Furthermore, there is nothing in the letter that shows that the advice was not solicited. Rather, the letter affirmatively shows that there had been prior contact, and, moreover, Mrs. Williams herself, testified that the meeting had been arranged through someone else, and that there was prior contact before that letter was written. So, this is not unsolicited advice, it grew out of prior contact. And finally, the crucial element of solicitation -- that phrase has been used in prior decisions in connection with the [51] Canons which existed before the Code was adopted in this State, all involve an element of personal gain on behalf of the attorney who allegedly solicits. There is no evidence that any such financial gain, or expectation thereof, was involved in this case. In point of fact, Mrs. Williams' own testimony was that there was no talk of any fee going to Edna Smith. Edna Smith does not represent her and never offered to represent her for a fee. But I think it's perfectly clear that that element is missing so that the charges, really, on their face, and certainly in light of the testimony, don't make out even a prima



facia showing of a violation of the disciplinary rule. So, we would move, for those reasons, that the complaint be dismissed.

MR. KALE: May it please the Panel, we believe that the complaint does allege a violation. It specifically states that this is solicitation in violation of the Canons of Ethics. And, of course, the solicitation provisions of the Canons of Ethics are Canon 2. Now, under the disciplinary rules of Canon 2, there are several which we feel are applicable in this particular case; DR2-104, Subsection 5, says, "A lawyer who is giving unsolicited advice to a layman that he should obtain counsel or take legal action, shall not, except employment resulting from that advice, except that -- Number 5 says:

(Thereupon number 5 published)

[52] MR. KALE: (Continuing) Now, this action which the ACLU is bringing in this sterilization case, the Doe v. Pierce Action, was a class action. They were contacting several people in order to get these people to bring the action. And specifically the Canons state may accept but shall not seek. And I think we have had plenty of testimony here today from

Mrs. Williams that there was actually a very active case of seeking to get her to bring the action and to let the American Civil Liberties Union bring this action for her. Other disciplinary rules which we feel like are appropriate here would be DR2-103-1, Subsection d and 5 we feel are applicable here. A lawyer shall not knowingly assist a person or organization that recommends, furnishes or pays for legal services to promote the use of his services or those of his partners or associates, however, he may cooperate in a dignified manner with the legal service activities of any of the following provided that his independent professional judgment is exercised in behalf of the client without interference or control by the organization or other persons. Then down, Subsection 5 it talks about a non-profit organization that recommends, furnishes or pays for legal services to its members or beneficiaries but only in those instances and to the extent that controlling constitution interpretations at the time of the rendition of the services requires the allowance of such service activities [53] and only in the following conditions unless

prohibited by such interpretation. And the primary purpose -- and then Subsections a and c, "the primary purposes of such organizations do not induce [sic] the rendition of legal services; and c, "such organization does not derive [sic] a financial benefit from the rendition of legal services by the lawyer. I think it's apparant [sic] from the letter that Edna Smith was soliciting for the American Civil Liberties Union, that she was seeking to represent this party and not accepting the services, we feel like this would be a violation and we feel like the case has been made out in this instance.

MR. MCCUTCHEN: The Panel is of the opinion that the testimony of the Respondent together with the letter certainly, at this point of the proceeding, and the testimony raises a sufficient issue at this stage of the proceeding to go forward. So, at this point, we deny your motions.

MR. MCDONALD: All right, sir. Before we proceed, if we may, we have several witnesses, and we have character witnesses who are members of the local Bar and we would request that we be allowed to call them out of turn so that they can return to their businesses. Would there be any

objection to that?

(Discussion off the record)

MR. MCCUTCHEN: I think you may take them up out of order. You don't object, do you?

[54] MR. KALE: No. I don't know what their purposes are for introducing; if it's for good character, we have no objection.

MISS EDNA SMITH, the Respondent, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

QUESTIONS BY MR. MCDONALD:

Q. What is your name, please? A. Edna Smith.

Q. Miss Smith, where were you born, and when? A. In Yamasee, South Carolina on June 27, 1944.

Q. And are there other members of your family? A. Yes, there are. I have three sisters and three brothers.

Q. And are your parents alive? A. My Father is deceased, my Mother is still living.

Q. When did your Father die? A. Several years when I was very small. He was fifty - sixty years old.



Q. What employment, if any, did he have when he was alive? A. He was a small-time farmer.

Q. Was he a property owner there? A. No, he was not.

Q. He was a sharecropper? A. Yes.

Q. What about your Mother, did she have employment at that time? [55] A. She did various jobs consisting of domestic work in hotels, peoples' homes, and she worked in restaurants [sic].

Q. Tell me your education, where you received it and the extent of it. A. I attended high school at -- high school in Beaufort, South Carolina, and I also went to two years of junior college at Madder Junior College at Beaufort, South Carolina. I transferred from there to the University of South Carolina here in Columbia which I graduated in 1966. I subsequently went to the University of South Carolina's Law School in 1969, which I graduated in 1972.

Q. Did you receive any scholarships or financial assistance as you were going through school? A. Yes, I did. I received a number when I was in high school from various people; in fact, that was my primary means of getting an education. The high school was a boarding institution. I

also received the same thing at the junior college and at the University of South Carolina undergraduate school and also two years of law school.

Q. Did you have employment, fulltime employment prior to attending law school? A. Yes, I did.

Q. What was that employment? A. I worked for the South Carolina Counsel on Human Relations which is headquartered here in South Carolina at various [56] positions. I was Chairperson of a group called the Student Counsel on Human Relations out of the same organization. I also served as executive secretary during the time I left the University in 1966, and before I entered law school in 1969.

Q. Did you have employment during the time you went through law school too? A. The first year I did not work but I did work parttime during my second and third year at various jobs at the university law school.

Q. All right, now, when did you graduate from the law school here? A. May, 1972.

Q. And did you take the Bar exam thereafter? A. Yes, that following summer.



Q. And when were you admitted to practice here? A. September, 1972.

Q. What courts are you admitted to other than the Supreme Court of South Carolina? A. The Federal Court of South Carolina, the Federal District Court, and the Fourth Circuit Court of Appeals.

Q. Now, have you been involved in any public service work other than with the Human Relations Counsel? A. I've had various jobs, or doing various things on a volunteer basis as well. I served as student counsel with the upward [57] bound program for students who may not get to college but who had the potential, in 1966, at the University of South Carolina. I have participated in various projects; voter registration on a volunteer basis. I became a member of the Greater Columbia Literacy Counsel when it was first formed in Columbia in 1969, I think, to teach people to read and write in South Carolina.

Q. Was this work with the Literacy Counsel mainly with minority groups? A. It involved minority groups and non-minority people, anyone who could not read and who requested such services.

Q. What about the voter registration work that you spoke of? A. That was

primarily with minority groups even though it did not always involve minority groups.

Q. Have you told me all of your public service, volunteer or other work? A. Other than with the counsel through which we did several projects even while I was in school. The college students get together and go into the community to conduct surveys for day care centers, to even help the community on a specific project that was trying to get a day care center or try to provide services to the people to get various statistics in reference to setting up programs, and also to register people to vote or to educate them in their rights to register to vote and things of that nature.

[58] Q. Have you had occasion to be on the faculty of any college or university? A. Yes, I have. In 1972, September of that year, I became a faculty member at Allen University here in Columbia, from 1972, September, through May, '73. In September of '73, through December '73, I taught a course at Columbia College here in Columbia. And in 1974, I had a short course at the University of South Carolina for life enrichment program for senior citizens.

Q. Did you say what you taught at

Allen or Columbia College? A. No, I did not. I taught constitutional law, general principles of [A]merican law and consumer seminar [sic] wherein there was a grant between the two colleges from HEW, Benedict and Allen, to educate people on various aspects of consumer protection, housing problems, and getting employment, and generally spending their money and getting credits, just general information, seminar [sic] for the students at the two universities.

Q. What about Columbia College? A. At Columbia College it was a course wherein several areas of the law were dealt with in a general basis to give the individual who is not trained in law and may not go to law school, some idea of ramifications of law, and to explain to them some various general principles. It was called Principles of American Law.

[59] Q. Do you have any involvement with the American Civil Liberties Union? A. Yes, I do. I am a member of the Board of Directors and also an officer on the Board.

Q. When did you become an officer and a member of the Board? A. I think it was in 1972, I first served as an at large

member of the Board. In 1973, I became an officer, vice-president, and I have held that position since that time.

Q. Are you compensated for the time you spend on behalf of the American Civil Liberties Union? A. No, I'm not, it's purely voluntary.

Q. Do you sometimes incur out-of-pocket expenses for what you do for the American Civil Liberties Union? A. Yes, I do.

Q. Are you compensated for that? A. No, I'm not, It's a donation of my time to the organization.

Q. Now, will you tell me whether or not you know Marietta Williams who testified earlier this morning? A. Yes, I met her once.

Q. Tell me how you came to meet her. A. I was contacted by a member of the South Carolina Counsel on Human Relations for whom I served as a consultant.

Q. Who was that individual? A. It was Ed McSweeney who worked for the South Carolina Counsel For Human Rights. And he told me that he wanted me to [60] investigate the situation in Aiken, South Carolina with reference to the sterilization and a request that the Counsel had received.



Q. Now, was this during the time when you were employed by the Counsel? A. Yes, I served as legal consultant for the South Carolina Counsel on Human Rights. And that was in connection with that capacity that they contacted me.

Q. And tell me what you did? A. He told me to contact a Mr. Gary Allen in Aiken, whom I did not know, and to call him and he would arrange for me to talk to people in Aiken who had been sterilized, and to make a report back to him. He told me that he did not have Mr. Allen's telephone number but to get it from Mrs. McKnight, a lady here in Columbia, whom I did call and received Mr. Allen's telephone number. I think his number, at the time, was unlisted. I called him and told him that I would contact him -- that I was contacted by the Counsel -- and I was to contact him in reference to the situation in Aiken, which had also been publicized in the newspapers. And he told me that he would set up a meeting with women who had been sterilized, in his office in Aiken, for me to come and talk to him. And he gave me directions -- a time was set up, and a date, and he gave me directions on how to get to Aiken and how to recognize where he was and who he was.

[61] Q. You say he said he wanted you to talk to them. Did he tell you any particular things he wanted you to discuss? A. Ed McSweeney did.

Q. What were you to talk to them about? A. About the recent sterilizations that had been reported in Aiken, to find out if, in fact, this was going on, and to generally get the story from the people who were involved. This was primarily in reference to the Counsel's request, and also the Counsel was involved in the study of welefare [sic] in South Carolina, the welefare [sic] program in South Carolina.

Q. All right, so what happened thereafter, after the conversation with Mr. Allen? A. A meeting was set up and I went to Aiken with Mr. -- and met Mr. Allen at his office. He introduced me to the people who had been there. And I discussed with him -- you know, I identified myself and told him who I was. And I talked to the ladies to find out, you know, what had happened, if they were involved, and general questions about the sterilization itself.

Q. Who was at that meeting? A. There were several individuals whom I don't know but I do remember Mr. Allen was there;



another lady by the name of Dorothy Waters, who, I think, lived in Aiken; Miss Marietta Williams was there along with either her mother or grandmother, some relative of the family; a Miss Virgil Walker; and some [62] other people whom I don't know. There were also some news media people.

Q. All right. Now, did you have any conversation with Marietta Williams at that meeting? A. I did talk to her in Mr. Allen's office; everyone was sitting around, and I asked -- we did have a conversation where I talked to her and she talked back to me.

Q. Tell me, describe this office, if you will. A. It is a trailer, two or three room trailer, and we met, I guess, in the living room area which also serves as Mr. Allen's office. It is on his car lot. There were several couches and a few chairs in a very small area of a small trailer. And that's where we all met and talked about it.

Q. Excuse me, did you have any conversations with her that didn't take place in that office? A. No, I did not.

Q. Tell me what the nature of the conversation with her was. A. The nature of the conversation with Mrs. Williams was to the effect, either I introduced myself

as Edna Smith from Columbia, South Carolina, and asked her her name and if she had been sterilized. She said she had. And I asked her if she wanted to discuss it. And she went into details about the doctor involved, when the incident occurred, when she first went to see the doctor, and how the issue of being sterilized came up before her baby could be delivered. She went through a [63] chronological statement of what took place and to explain to me that she had, in effect, been sterilized, and that her baby was dehydrated, I think she mentioned, and it was now under doctor's care and that she was concerned about her baby's health.

Q. Did you identify yourself as an attorney? A. I think I told her that I was.

Q. Did you identify yourself as somebody associated with the ACLU? A. I may have mentioned it to her. Now, I made a general conversation to the group as a whole wherein I introduced myself [sic] -- Mr. Allen indicated my name and I introduced myself. I don't recall if I told her that I was an attorney with the ACLU but she was a member of the group, not specifically to Mrs. Williams, but I did mention that I was an attorney.

Q. Did you offer to represent Mrs. Williams in a suit against Dr. Pierce?

A. No, I did not. In fact, I did not even mention a suit being brought by my [sic] for anyone at that meeting in July, either to Mrs. Williams or any of the other ladies, regarding the situation.

Q. Did you discuss with her any fee which you might charge in connection with representing her in any suit? A. No, I did not.

[64] Q. All right. Now, did you have occasion to talk with Mrs. Williams thereafter? A. I did. That was in reference to a letter which I had sent to her.

Q. All right, now, the letter you referred to, I believe, is the August 30, 1973 letter? A. That's correct.

Q. To Mrs. Williams? A. Yes.

Q. Tell me how you came to write that letter to her. A. This was as a result of receiving correspondence from Mr. Gary Allen in Aiken that the ladies who had been sterilized were interested in bringing legal action. This was also as a result of being informed by one of the board members of the South Carolina Chapter of the American Civil Liberties Union that

that the organization wanted to pursue the issue as far as litigation was concerned. This was also as a result of having conversation with a member of the National Organization in New York, who indicated the ACLU was interested in pursuing litigation as the local organization had indicated, and asked me to contact them.

Q. Now, you say the ACLU was interested in pursuing it. Did they receive a request from someone to represent them in connection with litigation against Dr. Pierce? A. Yes, they did, from Miss Dorothy Waters who sent the letter in.

[65] Q. Tell me about that letter. Have you seen it? To whom was it addressed? A. It was addressed to the American Civil Liberties Union. I have seen it but I do not recall, word for word, what it said but the effect of it was, I am interested in talking about -- talking with the ACLU about the operation that was performed on me and I would like, you know, to have it explained as to what my rights are and what is involved. That was the essence of the letter.

Q. Was that letter written after this July meeting? A. Yes, it was.



Q. And was that letter written before the August 30 letter?

MR. KALE: May it please the Panel, I wonder if they intend to introduce these letters.

Q. (By Mr. McDonald) Do you know where that letter is? A. I think it's probably in the possession of the American Civil Liberties Union.

MR. KALE: Well, it seems like to me that's the best evidence in the case if they want to bring in the contents of certain letters I think they ought to introduce them, the letters themselves, rather than someone testifying from memory on these things.

MR. MCCUTCHEN: I think the letter is the best evidence.

MR. MCDONALD: We will attempt to secure a copy [66] of the letter and then we will introduce it.

Q. (By Mr. McDonald) Did you have any conversations with Gary Allen? You talked about a letter from Gary Allen and a letter from one of the Plaintiffs in the Doe v. Pierce case. Did you have any conversation with Gary Allen prior to writing the August 30 letter? A. Yes. He called the office twice in reference to that as well

as with reference to other problems he wanted legal assistance on. And he asked me then what could the ladies do about bringing litigation, some of them were interested in bringing suit for the sterilizations. And I told them if they were to send their request into the American Civil Liberties Union.

Q. And did the request from Mrs. Waters follow that conversation? A. Yes, it did.

Q. Did you have any conversations thereafter with Mr. Allen? A. I'm not sure. I talked to him on different occasions. I'm not sure when the letter came in. He has called several times prior to the August 30 letter but I had numerous conversations.

Q. Was the August 30 letter in response to those letters from Mr. Allen? A. Yes.

Q. Has he asked you to write the ladies and have the ladies represented by the ACLU --

[67] MR. KALE: I think he is leading the witness and testifying as to what someone may have said.

MR. MCDONALD: The witness will be here. I think she can explain what



transpired that she responded to.

MR. MCCUTCHEN: I think the witness could simply testify that she had the conversation. I think it is hearsay to go into the conversation.

MR. MCDONALD: It wouldn't be for the truth of the matter alleged, the fact that he, in fact, did say those things. I think that's clearly an exception to the hearsay rule. It's proof of utterance [sic], not proof of the matter. I think we can show what he said and what she acted in response.

MR. MCCUTCHEN: I'm inclined to say that you invade the hearsay rule. I think the witness can testify that she had the conversation, and you can put the person up who will testify as to what he said. I don't think this witness can go into a discussion as to what a third party told her.

MR. MCDONALD: What that does, it deprives her of the opportunity to explain why she did what she did. We are not offering it to prove the truth of the matter but that utterance was made. That's the basis of her action.

MR. MCCUTCHEN: I think you have accomplished the same thing by asking the

witness if she had a conversation [68] and what she did as a result of the conversation. I think it's implicit without going into the details. She can testify that she had the conversation and as a result of the conversation what she did.

MR. MCDONALD: We would like to preserve the record.

MR. MCCUTCHEN: Surely, your position is preserved.

MR. MCDONALD: Our offer of proof is that she was requested by Allen to correspond with them and to write the letter she wrote.

Q. (By Mr. McDonald) You had conversations with Mr. Allen and based upon those conversations you wrote the letter of August 30, is that correct? A. Yes.

Q. Now, these individuals, these women you met with who had been sterilized by Dr. Pierce, were you able to observe whether or not these were people of substantial education? A. In my judgment, from talking to the persons, I determined that most of them had very little educational training and background.

Q. All right. Now, did you talk with Mrs. Williams after you wrote the August, 1973 letter? A. Yes, I did. She

called my office.

Q. All right, now, tell me when you talked with her. A. I believe it was August the 31st, the day after I wrote the [69] letter, I received a collect call from her and she said that she was calling in reference to the letter. And she asked me what was involved in a lawsuit. I explained to her the purpose of why lawsuits are brought, to protect the individual's rights, and that this was for the sterilization that was performed. She had several questions and then she said, to the effect, that she had already signed a release with Dr. Pierce, that she would not bring any action against him. This was at the request of either her mother or her grandmother and Dr. Pierce. She also told me that she was not interested in being interviewed for a magazine, which was also in the letter. After that, perhaps a couple of hours later that afternoon, she called me again and was saying that she was thinking about the matter and was just wondering, you know, if maybe she could change her mind. She told me then that she had regretted signing the release but that she was living with her mother or grand-

mother and was dependent upon them for helping her with her children, and since they had gotten her to do this she didn't really think that she could -- that she should change her mind and go against them, and that she had regretted that she had done that, but since it was her mother or grandmother that she would probably abide with that.

Q. Do you represent Mrs. Marietta Williams in any capacity? A. No, I do not.

[70] Q. Have you accepted any employment from her? A. No, I have not.

Q. Have you ever offered, personally, to represent her in any capacity? A. No, I have not.

Q. In your discussions with the various people who were present at that first meeting at Mr. Allen's office now, did you observe whether the women who had been sterilized were aware of their rights under the constitution? Did it appear from your discussions with them?

MR. KALE: Objection, that's a conclusion on her part and I don't see what relevance that has. It certainly is an opinion on her part which I don't think is proper for her to make.



MR. MCDONALD: We would try to tie that up later on. Of course, Canons, of course, not merely permit but place upon the attorneys a duty, ethical responsibility to advise layman about their rights and to make counsel available. Of course, counsel went into great length about that, if anything Miss Smith did was in the discharge of that duty, under Canon, I think is clearly relevant in these proceedings. And her perception of these individuals is, of course, absolutely germane to the issues here.

MR. MCCUTCHEN: The Board is of the opinion that you will be permitted to ask the witness simply if the people [71] with whom she talked are people of limited education. I think she has already indicated this. But other than that, as to what impressions she may have drawn, I don't think that that's proper. And I'm not all sure, the Panel is not at all sure that the activities with reference to others other than Mrs. Williams would be particularly germane.

MR. MCDONALD: All right, sir, if I ask her not what her impression was but whether or not she observed if Mrs.

Williams was aware of her rights under the constitution would that be less objectionable?

MR. MCCUTCHEN: Well, I think that she could tell you what discussions she had, what she observed about Mrs. Williams.

MR. MCDONALD: Well, may I ask the question?

MR. MCCUTCHEN: Sure.

Q. (By Mr. McDonald) Can you respond to the question which I requested the Panel to let me put to you? A. Would you repeat that, please?

Q. Did you observe whether Mrs. Williams was aware of her rights under the Constitution of the United States? A. No, I did not observe that she wasn't [sic] aware of her rights; in fact, I don't think she knew what the rights were.

MR. MCCUTCHEN: Of course, I think that's going a little far, counsel. I think you can have the witness relate any discussions that she had. But it seems to me the [72] expression of her opinion as to what Mrs. Williams did or did not appreciate wouldn't be proper.

MR. KALE: We would move to strike that. Marietta Williams was up here and



they could have asked her that question. We don't think it's a proper one for her to answer.

MR. MCDONALD: Let me respond to that if I may. Of course, what we are involved -- this is a quasi criminal proceeding and we are talking about the motive, which is an aspect of the finding of violation of any disciplinary rule, and we are talking about motive and intent, and that's precisely what my questions to Miss Smith go to. And I think it's clearly relevant, I don't think it ought to be struck.

MR. MCCUTCHEN: Well, counsel, I think you have got a deeper problem than that. The Panel doesn't object to your questioning the witness as to exactly what went on discussionwise between this lady and Mrs. Williams but I don't think it's proper to ask this witness to express an opinion as to what Mrs. Williams did know or didn't know and what she realized and what she didn't realize. I think she can testify as to the observations she made as to what took place. But I don't think she can inject her opinion as to what Mrs. Williams knew or didn't know, I don't think that's proper.

[73]MR. MCDONALD: All right, sir.

Q. (By Mr. McDonald) Miss Smith, did the women at that meeting who had been sterilized tell you that they had been coerced in any way into submitting to sterilization?

MR. KALE: Objection, that's hearsay.

MR. MCDONALD: Well, now, Mrs. Williams made certain representations about coercion [sic] and this all goes to prior inconsistent statements and would be an exception to the hearsay rule.

MR. CRUM: Your question, counsel was, did the women.

MR. MCDONALD: Well, let me just rephrase it, sir. Thank you, sir.

Q. (By Mr. McDonald) Did Mrs. Williams indicate to you that her sterilization had been coerced by Dr. Pierce? A. Yes, she did.

Q. In what way? A. She told me that during the course of going to Dr. Pierce, after she discovered that she was pregnant, -- he was her obstetrician for previous deliveries -- and that it was mentioned sometime between the time she went and the delivery of the baby that if he delivered the baby that she would

have to consent to being sterilized before he would do such.

MR. KALE: May it please the Panel, I don't know what's the relevance, or whether the sterilization was [74] coerced or not has to do with this particular proceeding we have today. And I would move to strike this testimony as not being relevant to the issues germane to this proceeding.

MR. MCDONALD: It goes to impeachment.

MR. MCCUTCHEN: The Board is of the opinion that we will leave the question, we won't strike it. It may have some relevance insofar as credibility is concerned. We will leave it in, at this time, for whatever it might be worth.

MR. MCDONALD: Thank you, very much. Would you answer any questions put to you?

(Discussion off the record)

CROSS EXAMINATION:

QUESTIONS BY MR. KALE:

Q. Miss Smith, would you please tell us what your responsibilities are with the American Civil Liberties Union. A. I serve as Vice-President of the American Civil Liberties Union Board of Directors.

Q. Go ahead. A. And in that capacity I sometimes preside over meetings or

I sometimes arrange meetings for programs that the ACLU sponsors. And I have also headed the committee [sic] on welfare [sic] the welfare [sic] committee [sic] which involves relating to welfare [sic] issues of the ACLU's as a -- representing the ACLU as a member of the groups that are concerned with welfare [sic] issues.

[75] Q. Do you represent clients for the ACLU in litigation? A. I have not represented any client for the ACLU in court. I have represented clients in other legal matters that did not involve litigation.

Q. Are you a cooperating attorney with the ACLU? A. Yes, I am.

Q. Now, when you went to Aiken, South Carolina how did you become acquainted with Mr. Gary Allen? A. I was given his name by the gentleman from the Counsel [sic] on Human Relations who told me to call him. I had never met him before. I subsequently called him and told him about the call that I had received in reference to talking to the women. And I met with him at his office in Aiken for the first time.

Q. What is Mr. Allen's involvement in the sterilization problem in Aiken?

A. I got the impression from him that he,



because of prior contact with the Counsel [sic] to represent him in matters, had requested that we come down to see what could be done. And he subsequently wrote to me and called me in reference to representing -- getting representation for the ladies who had been sterilized. I do not know of any subsequent involvement other than in those communications in 1973.

Q. You said that he called you about representing. Did he also talk about you being possibly one of the attorneys? [76]  
A. No, he did not. He indicated that the ladies were interested in bringing suit for sterilization.

Q. Just tell me did he indicate that you should be an attorney also in this matter? A. No, he did not.

Q. Is he a member of the ACLU? A. I don't really know.

Q. You don't know what connection he might have with the American Civil Liberties Union? A. No.

Q. When you went to Aiken, South Carolina I believe you testified that there was a Dorothy Waters and a Virgil Walker also present at the meeting? A. Yes.

Q. Who were the other ladies besides

those two and Marietta Williams that were present? A. Those were the only ones to whom I talked. There were other people whose names I didn't know. All these people were new to me. There was Mr. Allen and his secretary there. I don't know of any other ladies who were there that had been sterilized. I didn't get the names of the other ladies I did not talk to. Those were the three to whom I talked. I do think that Mrs. Williams' mother or grandmother was also there, I do not recall her name.

Q. Was Shirley Brown present? [77]  
A. No.

Q. She was not present? A. No, she wasn't.

Q. Now, did you advise Mrs. Williams of her legal rights at the time you met her in July? A. I told the group in general, and I might have told Mrs. Williams the same thing, that they had certain rights under the constitution, legal rights under the constitution.

Q. Did you discuss the recourse they had for vindicating or enforcing these legal rights? A. I discussed that with Mr. Allen in the presence of the group as far as what their rights might be in my opinion.



Q. So that they knew that they could bring a lawsuit? A. I told Mr. Allen in response to his questions in front of Mrs. Williams and other members of the group that there were certain legal remedies. I did not indicate to them that they could bring a lawsuit or that they should bring a lawsuit. I did not tell this to Mrs. William [sic] directly or to any of the other ladies directly. We discussed this with Mr. Allen.

Q. They knew they could bring a lawsuit. Did they know they could get some money damages from a lawsuit? A. I did not tell them. I did tell Mrs. Williams this in response to her telephone conversation on about August 31st.

Q. Okay. Did anyone else at that meeting talk about money [78] damages? A. I do not recall. There were several other people who were also holding conversations with the women and I do not know what was going on.

Q. Did Mr. Gary Allen ask you a question as to whether they could recover money damages? A. I do not recall, at that meeting, that that was mentioned. In fact, I don't think we got into the details of what a lawsuit involved or what. We were gathering information to find out if this had indeed happened from the ladies who were involved.

Q. What did you tell Marietta Williams about what rights she had? A. I first got her story from her. I asked her, you know, did she consent to this or was she coerced. And I told her, in response to

her positive answer that she was, that if she was coerced that was not the proper procedure and that she could, you know, she had legal recourse against being forced into doing something. I was explaining to her my interpretation of what she had told me in reference to the operation.

Q. Did you tell her that sterilization was wrong? A. No, I did not tell her that sterilization was wrong.

Q. Did you tell her that what the doctor was doing was wrong? A. I did not tell her what the doctor was doing was wrong. I [79] said, if you had -- as she had said -- been coerced into being sterilized against her wishes that I thought that that was wrong.

Q. When did the ACLU decide to support a legal action in this case? A. I do not remember the exact date but it was communicated to me either in July or August, the latter part of July or the first part of August, from one of the Board members of the South Carolina ACLU that they were interested in getting involved in the matter. And in August, prior to the letter, I talked to a lady who called my office from the National ACLU. So it was possibly in August of '73.

Q. Now, wasn't this letter that you sent to Mrs. Williams an attempt to get her to bring the lawsuit so that they would have parties to bring the lawsuit?

A. No, that letter was not an attempt to get her to bring the lawsuit. I was told to inform her that there was an organization who was willing to assist her if she was interested in doing that. And I wrote the letter to her as a result of that.

Q. Well, you were writing her as an attorney and telling her that she had legal recourse and that the ACLU would bring the suit for her. A. Well, even though I signed the letter as an attorney I was writing to her on behalf of the ACLU as a member.

[80] Q. Well, there was no doubt in your mind, was it, that you had told her that you were an attorney and that she was thinking of you as an attorney, is it?

MR. MCDONALD: I object to what she thought she may have thought she thought.

Q. (By Mr. KALE) Is there any doubt in your mind that Marietta Williams thought you were an attorney?

MR. MCDONALD: I object to what -- no, go ahead.

MR. MCCUTCHEN: Yes, I think that's improper, she can relate what she told her.

Q. (By Mr. Kale) Did you tell Marietta Williams that you were an attorney? A. I think I introduced myself as Edna Smith from Columbia. I may have told her I was an attorney.

Q. And you signed this letter as an attorney, didn't you? A. Yes, I did.

Q. Now, in this letter it says that the American Civil Liberties Union would like to file a lawsuit in your behalf for money against the doctor who performed the operation, is that correct, is that what you said? A. That sounds like what I said.

Q. I would like for you to look at that letter. Is that the letter that you wrote? A. Yes, it's a copy of the letter.

Q. This is a copy of the letter that you wrote? [81] A. Yes.

Q. Now, I believe you previously testified that there was a -- was there a letter from a Dorothy Waters? A. Yes, there was one.

Q. Did that come to you? A. No, it did not come to me.

Q. Do you have that letter? A. No, I do not. I have seen it.



Q. Supposedly this letter said that Dorothy Waters wanted to bring an action?

A. As far as I can remember the letter stated that I want the ACLU to represent me. Now, the phrasology [sic] might be different, I don't recall the exact words.

Q. This is Mrs. Dorothy Waters?

A. Right, this is Miss Dorothy Waters.

Q. You don't have any information as to whether Marietta Williams wrote that letter or wrote a letter like that, do you?

A. No, I do not have --

Q. Did you ever receive a letter from Marietta Williams to that effect? A. No, I did not.

Q. Did Dorothy Waters ever bring an action? A. I do not know if she is a party in this suit.

Q. Do you know who is a party in this suit? [82] A. I think the plaintiff is listed as Jane Doe and I think that involved one of the ladies, Mrs. Virgil Walker, and the other is Mary Roe. I'm not sure who is who but I think that the two are -- there is a Virgil Walker and Mrs. Shirley Brown.

Q. Okay. So Dorothy Waters never brought an action herself? A. I don't think she is a named plaintiff.

Q. Do you know what connection Gary Allen had with Marietta Williams? A. I do not know what relationship or connection he had, but when he called me I assumed that he either had her permission or he was acting on her behalf and on behalf of the other ladies as well.

Q. What led you to think that? A. The fact that he knew them; that in the conversations with him at his office he said he had requested several people to investigate. He had sent requests to several places and he was trying to get something done about what was going on. And this was his practice for any other thing that went on.

Q. Now, I believe you testified that you told him to tell the women to send their request in. A. This was after he asked me about their bringing a lawsuit. I told him to have them, if they were interested, to send the request in.

[83] Q. Did you ever receive a request from Marietta Williams?

MR. MCDONALD: I believe she has answered that question once.

MR. KALE: I would like to ask it again.



MR. MCDONALD: Well, I see no reason to keep going over the same thing over and over.

MR. MCCUTCHEN: Yes, I think she has answered it.

Q. (By Mr. Kale) Well, why, if you never received a request from Marietta Williams, did you feel it was necessary to write her a letter? A. I did this as a result of conversations with Mr. Allen because he said the women were interested -- and at that time, to my knowledge, we had received one request. And the ACLU said they wanted to get the women who were involved.. And I did know from talking to her that she was one of the ladies who had been sterilized.

Q. But Mr. Gary Allen had no responsibility with or connection with Marietta Williams. He didn't represent her in any way did he? A. I didn't know that. He was the one who introduced me to her as well as the other ladies, I didn't know anyone in Aiken. So when se salled [sic] I assumed that he was acting on her behalf or knew what her intentions were.

Q. Well, who else did you write letters to besides Marietta Williams? [84] A. To --

MR. MCDONALD: Well, I would object to that, I don't know that -- it's irrelevant, it's not involved here. What's involved here is a letter. I don't know that other letters that she may or may not have written have any relevance here.

MR. KALE: I believe that she testified that she was acting at the insistence of Gary Allen and this motivated her writing a letter to these women, and I want to see who else was written to see if she carried out this motivation.

MR. MCDONALD: Well, I think this motivation obviously was carried out because the letter was written, and any other letters are irrelevant to these proceedings.

MR. KALE: Well, Your Honor, I think, if she didn't write but one letter I would somewhat question her testimony. I think its relevant to see if this wasn't what induced her to write this letter.

MR. MCDONALD: She told what induced her to write the letter.

MR. KALE: I think I can go in to

examine it, whether this is a truthful statement.

MR. MCDONALD: But she answered truthfully that she did write the letter and I think that's what's relevant.

MR. KALE: May it please the Panel, I think they [85] have gone into extensively areas involving communications with other people; Dorothy Waters, Gary Allen, letters that they have not presented here at this hearing. I think it's something that they brought in. I think I should have the opportunity to examine this because it is going towards the motivation which they have presented in her defense.

MR. MCCUTCHEN: Counsel, I realize the difficulty a bit ago, we got into with some discussions with others other than Mrs. Williams. I think we limited, to some extent, the examination of counsel for the Respondent. The thing that troubles the Panel somewhat is that you have based your complaint on this one letter of August 30, 1973, that the Respondent had written to Miss Williams. And I'm wondering if we aren't getting a little far afield now in going into correspondence with these various other people.

MR. KALE: The only extent is that I want to see if any other letters were written, I don't care what they said. I just want to know -- that's the only question I had to ask.

MR. MCCUTCHEN: Well, suppose you let her answer and let's discontinue the course of this. We can take it for whatever it's worth.

MR. MCKEOWN: Is your purpose just to determine intent or motive in writing the letters?

[86] MR. KALE: They have presented her motive of writing a letter and I'm just examining that motive.

MR. MCKEOWN: It may have some bearing on whether she intended to solocit [sic] but it would not --

MR. MCCUTCHEN: Suppose [sic] you just limit it to whether or not she wrote other letters. Let's don't get into the letters themselves because I really don't think it has any relevance insofar as the contents of the letters are concerned.

Q. (By Mr. Kale) In response to Mr. Allen, did you write more than one letter?  
A. Yes, I did.

Q. Other letters to other women besides Marietta Williams? A. Yes.

Q. Had you had any contact, prior to this time, or do you know if anyone had any contact with Virgil Walker? A. Prior to what time?

Q. To writing the letter of August 30? A. Yes, I had met Virgil Walker in July.

Q. Did -- had Mrs. Walker indicated that she would like to bring a suit, at that time?

MR. MCDONALD: I object to that on the grounds of relevancy, we are trying something entirely different.

MR. MCCUTCHEN: I really don't think that has any relevancy to it. [87]

MR. KALE: If it please, we feel like that perhaps the party, Mrs. Virgil Walker, had some hesitancy about bringing a lawsuit and we feel like this may have been a motivation for Miss Smith continuing to contact other parties in order that they might secure a party who had been sterilized to bring the action. I think this is relevant to the intent and motivation involved in writing the letter and I would like to go into it.

MR. MCCUTCHEN: The Panel is of the opinion that you have elicited from the witness the fact that she wrote other letters.

I think we are going to unduly prolong this if we attempt to take up these other people. I think you should limit it to the relations and the dealings that she had with Marietta Williams.

Q. (By Mr. Kale) Miss Smith, do you know if it's a custom of the ACLU, when they bring suits of this character for Civil Rights, or whatever, to ask for attorney fees? A. I had been told that recently that ACLU has asked for attorney fees in civil liberty cases that they have brought.

MR. KALE: Okay, I have no further questions.

REDIRECT EXAMINATION

QUESTIONS BY MR. MCDONALD:

A. [sic] When you talked with Mr. Allen, did he indicate to you any of the women did experience, or were experiencing, difficulty in corresponding with you, writing letters? [88]

MR. KALE: Objection, Your Honor, I don't know what relevancy that has. It's also heresay.

MR. MCDONALD: We are going to have some later testimony which will tie all this in and talk about -- of course, you see, not everybody knows about lawyers,



knows about writing letters, the people who do want help, who are not able to communicate in the sophisticated way that we are.

MR. KALE: Your Honor, they have continuously wanted to go into what the other parties have been doing and what difficulty they were having. And when I asked a few questions they objected to that. I again object. If we are not going to broaden this thing, I don't see what the relevancy is.

MR. MCDONALD: I'm not trying to broaden it. I want to specifically ask about Marietta Williams.

MR. MCCUTCHEN: I think if you ask about Marietta Williams, I think that's all right. But I really don't think we need to explore the matters --

MR. MCDONALD: Yes, sir, my question was too broad. I was going to say inartful when counsel has to accuse himself of that.

Q. (By Mr. McDonald) Did he indicate to you that Mrs. Williams was having any difficulty in corresponding with you? A. His conversation was to the effect that he wasn't sure if he could get the ladies to write out themselves or to [89] communicate

their intent of bringing a lawsuit.

Q. Why did he say they were having difficulty or he was having difficulty?

MR. KALE: Objection again. He is going to be here to testify and I would rather him to testify.

MR. MCCUTCHEN: I'm inclined to agree. I think she can simply testify as to whether she got letters or didn't. I think Mr. Allen can testify as to what he knows about it.

MR. MCDONALD: All right. That's all that I have of this witness.

MR. KALE: Could I ask one more question, please?

RE CROSS EXAMINATION:

QUESTIONS BY MR. KALE:

Q. I might have asked you this on cross examination before but I would like to ask you again. Do you have Gary Allen's letter? A. No, I do not have any letter from him in my possession.

Q. Did you receive a letter from him or was it telephone calls? A. I think there was a letter and several telephone calls. I do not keep every piece of correspondence I receive.

Q. You don't have it? A. No.

EXAMINATION:

QUESTIONS BY MR. CRUM:

[90] Q. Miss Smith, what is your occupation? A. I'm an attorney.

Q. You practice law in Columbia?  
A. Yes, I do.

Q. And I believe you stated that you were -- you first came in contact with the situation in Aiken through the South Carolina Council on Human Relations, is that correct? A. Yes, I was serving as legal consultant to the organization at the time.

Q. What is Mr. Allen's connection with the South Carolina Council on Human Relations? A. The previous attorney with the organization, or who had served as a consultant had represented him in legal matters. He might be a member.

Q. You don't know whether he pays his dues, or not? A. No, I don't.

Q. I believe you stated that you were not compensated in any way by the ACLU for your services to them? A. That is correct, yes.

Q. Who arranged this meeting in Aiken?  
A. I called Mr. Allen in reference to

response from the South Carolina Council on Human Relations and they set up a meeting, got the ladies together and told me it would be at his place and a time was suggested that would be convenient for me, him and the ladies. And he gave me the directions [91] as to how to get there.

Q. So, you instigated the meeting?  
A. In response to the request that the Council had received.

Q. Do you know -- I will rephrase this. Was Mr. Allen an acquaintance of all these women? A. I really don't know.

Q. Now, I believe you stated that Mr. Allen had told you that Mrs. Williams was interested in litigation against the doctor. Did he make that statement? A. Yes, when he called. And I'm not sure that it was in his letter that he made reference to the ladies and she was one --

Q. But he did specify Mrs. Williams?  
A. Yes, he did.

Q. Now, with reference to this magazine article mentioned in your letter, I believe you testified that Mrs. Williams indicated that she didn't want to have anything to do with that. Did you arrange this magazine article? A. I did not, someone called.

Q. Who called you? A. It was from the National ACLU Office in New York.

Q. But the ACLU did instigate this magazine interview? A. Yes, that's how I heard about it.

Q. And you are a member of the ACLU presently. Is this a local chapter, or something? A. This is the South Carolina Chapter.

[92] Q. I believe you heard Mrs. Williams testify, and she indicated in her testimony, that she was not coerced by Dr. Pierce in having sterilization. Did you hear her testify? A. I believe that's what she testified to.

Q. I believe you testified to the fact that she said she told you that she was coerced. A. She did. I don't think she used the word coerced, that she was made or forced to sign.

Q. At what time and place did she make this statement to you? A. This was at Mr. Allen's Office in July.

Q. Was there anyone else present at that time? A. Yes, the other ladies, Mr. Allen and several of the people, were all in one room.

Q. Did they hear her make that statement? A. I do not know who heard her but

we were very close together so several people probably did hear the conversation.

Q. I believe you testified to the fact that she was advised of her legal rights, her constitutional rights, you used it one time. A. Yes.

Q. Exactly what do you mean by that, what did you tell her? A. This was in reference to her telling me that she was made to sign a statement because her baby wouldn't be delivered by the doctor unless she consented to the sterilization and that she was forced or made to sign it. I don't think [93] the word coerced was used by her. And I told her, in response to that, that if she did something against her will, being forced to do that, that that was wrong and that she had the right to know what she was doing and not be forced to do something like that.

Q. Now, did you have any contact at all with Mrs. Williams between the time of the first meeting in Mr. Allen's Office and the time of the telephone conversation after receiving the letter of August 30? A. No, I did not.

EXAMINATION:

QUESTIONS BY MR. MCKEOWN:



Q. Miss Smith, you apparently occupy several capacities with several different organizations. You, in 1973, you were associated with the South Carolina Council on Human Relations? A. Yes.

Q. And you occupied a legal capacity with that organization at that time? A. I served as legal consultant to them.

MR. CRUM: Is it Human Relations?

THE WITNESS: It's now the South Carolina Council For Human Rights. It was the South Carolina Council On Human Relations. It's the same thing.

MR. CRUM: Excuse me for interrupting here but I won't [sic] to get it straight in my mind. This is a private [94] organization, that's not the state? A. No, it's not, it's a private organization.

EXAMINATION:

QUESTIONS BY MR. MCKEOWN:

Q. Is that a non-profit organization? A. Yes, it is.

Q. What are its purposes? A. Its purpose is to protect individuals' right to equal opportunity in the democratic process through research and action programs.

Q. And you occupied a legal capacity with that group as a legal advisor? A.

Legal consultant, yes.

Q. Were you paid by that organization for your services? A. Yes, I was, I received a fee.

Q. A fee or a salary? A. A fee.

Q. On a matter to matter or case to case basis? A. It was a lump sum amount.

Q. A grant? A. Yes, ten thousand a year.

Q. And at the time you went to Aiken to meet with this group of people in July of 1973, did you go in your capacity as an attorney or legal advisor? A. No. Well, I guess I went in my capacity as a representative [95] of the Council at the time.

Q. And you went there for the purpose of rendering legal advice and looking toward the rendition of legal services, did you not? A. No, I went there as I was directed by the organization, to find out more information about their sterilization, which came from a request, I understood later, to get some assistance on the problem there and to really see if that was going on, and to talk to people who had been sterilized.

Q. Did you perceive [sic] your role, at that time, as a legal role? Did you

feel that you were making a legal investigation at that time? A. No, I did not because I had assisted the Council in other matters. It was not a view of being an attorney, for instance, because --

Q. But you did undertake, while you were at the meeting, to advise the ladies present of their legal rights, did you not? A. I told the ladies, in general, if they were coerced into doing this -- and I think I mentioned it specifically to Mrs. Williams and perhaps to the other ladies I talked to, that it was, in my opinion, wrong for them to be forced to do something. I discussed with Mr. Allen --

Q. You did undertake some explanation of what you perceived to be their legal rights to this group of people, did you not? [96] A. Not as far as bringing a lawsuit, to this group, I was discussing this with Mr. Allen in conversations as to what could the ladies do and could be done. He had told me that he was trying to get something done about the situation.

Q. Did you, at that time, feel that you were in any sense representing the ACLU, American Civil Liberties Union?

A. I told him that there was -- he had

asked about organizations or how could he get his [sic] done. And I did mention that I knew of the organization, the ACLU, an organization that could do this.

Q. Did you disclose to that group of people, at that time, that you were associated in any manner with the American Civil Liberties Union? A. I'm not sure if I told it individually or to the group that I was a member of the ACLU. I did tell Allen this and we were all in the room.

Q. At the time that you attended the July meeting, had the ACLU determined that it would support any type of legal action arising out of the sterilization procedure [sic] involving Dr. Pierce? A. That had not been brought to my attention.

Q. All right. Did you, at any time after that, make any report on what you had found, to the American Civil Liberties Union or the Council On Human Relations?

A. I did to the Council and I talked --

[97] COURT REPORTER: Excuse me just one minute.

MR. MCKEOWN: Okay

Q. (By Mr. McKeown) I asked her, I believe, did you make any report to either

the ACLU of the Council on Human Relations on your findings or your activities in the Aiken area, specifically with reference to the sterilization practices? A. I reported to the Council that I had gone and talked with the ladies. I discussed this with a member of the ACLU Board of Directors several days or weeks later when she called me in reference to the Board's decision.

Q. Did you make any recommendations to either of those organizations concerning the legal actions? A. No, I didn't.

Q. Did either of those organizations, at any time thereafter, determine to support a legal action with respect to the sterilization procedures [sic] in Aiken County? A. I was told by a Board member of the local ACLU that it had been discussed at a board meeting. This was a Sunday and they met that Saturday and I was not there, I had other commitments. And they had decided to persue [sic] the matter. That's how I found out about this organization getting involved. And I did talk to a lady in the National Office in reference to the ACLU getting involved.

Q. And was that conversation and that determination by the ACLU to support a

legal action made prior to August 30, 1973, [98] when you wrote this letter? A. Yes, it was.

Q. What is Carolina Community Law Firm? A. That was a public-interest law firm that was designed to persue [sic] various problems on behalf of the people who couldn't afford, with their income, like consumer issues.

Q. Was it supported by fees or by grants or just -- A. I think the concept behind the individuals who thought it up was to get support to do public interest work from foundations. There were two of us who had foundation grants. And requests were made to foundations when we realized that the response was negative, that we weren't going to get any total funding that we then changed the name, there is no longer Carolina Community Law Firm.

Q. What was the name changed to? A. To the members of the firm presently who are Buhl, Smith & Bagby.

Q. Were you operating on a grant at this time? A. Yes, at the time.

Q. What kind of grant were you operating on? A. The South Carolina Council



For Human Rights had received a grant from the Ford Foundation, and I was paid then [sic] thousand per year.

Q. Was that the only grant that you were operating on at that time? [99] A. Yes.

Q. Is or was Carolina Community Law Firm in any manner associated with the ACLU or any of its affiliate organizations?

A. No, that's a separate organization, separate from the ACLU.

Q. Did it have occasion to handle litigation for the ACLU or any of its affiliated organizations? A. No, the firm did not handle any litigation for ACLU. There is one member -- there was one member who served as staff attorney.

Q. For the ACLU? A. Part time.

Q. And who was that? A. That's Herbert Bhul [sic].

Q. So he was serving as a staff attorney at this time, August 30, 1973, for the ACLU. A. I think so.

Q. And how was he compensated for that? A. I think the arrangement is that staff attorneys are paid from the ACLU Foundation in New York.

Q. Are they paid on a standard salary

basis or fee basis or just how are they compensated? A. I think his arrangement was a standard salary.

Q. All right. You were practicing in partnership with him at this time?

A. Yes, we were together.

[100] Q. On August, 1973, the day that you wrote this letter to Mrs. Williams, had there been any determination made about proceeding with a lawsuit with reference to the sterilization matter? A. Not that I know of. I wasn't at the board meeting that the local ACLU had. And the board member communicated to me that they were interested in getting involved, and the other group also. There was this request that had been received, and I imagine that was discussed because they had a letter from Mrs. Waters.

Q. The meeting at which there was a determination that you would like to proceed with the lawsuit had been held and that determination made prior to August 30, 1973? A. Yes, that's correct. I was not in attendance.

Q. Had any decision been made about attorneys to handle that lawsuit? A. Not to my knowledge.

Q. What did you mean then when you said in your letter that the ACLU would like to file a lawsuit on your behalf for money against the doctor who performed the operation. And then later in the letter said, "Let me know if you are interested," or words to that effect.

A. Well, that was my way of putting what I understood the ACLU wanted to do, as well as Mr. Allen's conversations that the ladies were interested. And the ACLU could get clients.

[101] Q. Were you then seeking plaintiffs to maintain the action so that the action would not be maintained in the name of the ACLU? A. No, I wasn't, that was not my intent and I did not understand that at the time, or that I was seeking plaintiffs for the ACLU.

Q. Well, just what did you perceive to be the purpose of this letter then?

A. That the ACLU -- this is primarily from my conversations with the individuals involved, would like to, you know, if they were going to bring the suit from the request of one lady as a class action, and to get the other people there.

Q. But you were seeking members of

the plaintiff class, were you not? A. I guess, perhaps.

Q. And were you not soliciting their participation in the suit as a member of the plaintiffs' class? A. I didn't think I was soliciting their participation. I think perhaps the way I phrased it did not necessarily convey my purpose, but I also indicated -- because I knew that Mr. Allen called and said that the ladies were interested, that it was to communicate that the organization was interested, too, in bringing the lawsuit and if they wanted to be plaintiffs to communicate either with the [102] organization or Mr. Allen.

Q. But the purpose of the letter was to look for plaintiffs in the class action, was it not? A. The purpose of my letter was to let them know that there was an organization who could offer them legal assistance based on Mr. Allen's request to me and also the ACLU's interest.

Q. But you still had to have some plaintiffs to maintain the action who fitted the member of the class -- who fitted the class? A. There was already a letter that had been received, Mrs. Waters, that might have been mentioned in the letter. And I understand that there

was another request that came in.

Q. You received no such request from Mrs. Williams? A. That is correct. In fact, she called indicating the desire not to proceed.

Q. And before you wrote this letter, you received no request from Mrs. Williams to participate as a plaintiff in the class action? A. That's correct.

Q. And did you not say that it would be a fair characterization in this letter to say that it was an effort on your part to determine whether she would become involved as a plaintiff in this class action? A. I think my letter to her indicates that there was an [103] organization who was willing to assist her if she was interested, based on -- I don't know if it was a class action -- I didn't know they were going to -- this was after the letter I found out it was going to be a class action because we had one person already and another had come in. So, this letter was an indication of my communicating to her that there was an organization.

Q. That would bring a suit in some manner on her behalf? A. If she was interested, yes. That was a way of

informing her.

Q. All right, Ma'am. Is it not the practice of the ACLU to ask for award of attorney's fees in these suits? A. I have recently been informed that they have been asking, I really do not know that much about it.

Q. Do you know what disposition is made of attorneys' fees in those cases in which the ACLU participates and in which the court, in fact, does award them? A. I have been informed that that money goes to the ACLU Foundation in New York.

Q. Is that the same funds that are used to pay counsel in cases either as staff attorneys or their other participation in these cases? A. I'm not sure. There is an organization in New York and I have really never had the inner workings of the organization.

[104] Q. When the ACLU undertakes to sponsor litigation there would be certain costs attendant upon the litigation, would there not? A. Yes, that's correct.

Q. Where do those costs come from? A. The organization -- I'm not sure where it -- how it's distributed because I have never handled a case a such, I really don't have pertinent knowledge, but I was



informed that the ACLU pays the costs for cooperating attorneys.

Q. And you wrote this letter of August 30, 1973, as an attorney associated with the Carolina Community Law Firm which was a community interest law firm? A. I wrote it on our stationary [sic]. I didn't think -- that's the way I sign all -- it was a typical letter that I would write and that's the way I sign all the letters I write.

Q. You did write it as an attorney at law, you didn't write it as someone being affiliated with, for instance, the Council on Human Relations or some other organization? A. Well, I consider myself as an attorney. So, a lot of times I am an attorney on the board of the ACLU. I am an attorney who works for the Council. I did not differentiate between an individual being a member of the ACLU or an individual being an attorney or an individual attorney being a member, that was just the way I signed the letter. It was written on behalf of the American Civil Liberties [105] Union.

MR. MCKEOWN: I believe that's all.

# EXAMINATION:

## QUESTIONS BY MR. MCCUTCHEN:

Q. Miss Smith, do you remember exactly when you went to Aiken in July of '73? A. No, I do not recall the date. I do know it was in the last half of July, probably the late 19's or 20's in July, I don't recall the date.

Q. Is my recollection correct that sometimes during the course of that meeting, you indicated to them that you were an attorney? A. I introduced myself and I told Mr. Allen this because I had never met him before and we were all in the same room. I'm sure the group heard that I was an attorney or he might have told them, I don't really recall, but I did introduce myself and told them where I was from. And I might have told them that I was an attorney.

Q. And in that same conference or discussion am I not correct that somewhere during that, that in your investigation you also explained to them the matter of litigation? A. I did not explain to the ladies, only Mr. Allen and I talked about legal matters, and he asked me, you know, what could be done. He was interested in having something done about the case and he said

that's why the request was made, [106] trying to get people. I talked to Mr. Allen. Now, there were other people there who probably overheard the conversations because the room was rather small.

Q. Well, is it your testimony that you did not indicate to the group that there were certain types of litigation that were available to them? A. I told the group -- it's my testimony that I did not tell them that, you know, they could bring a lawsuit or they could go to court, whatever. I did tell the group generally-- and I know Mrs. Williams in particular, that if what was done to them was against their wishes that I didn't think that was right and they had the right to know what was being done to them. Now, I did discuss this with Mr. Allen and the group probably overheard.

Q. What you are saying then is that somewhere during the discussions the ladies that were there were given information or heard some parts of the information that litigation was available if they were aggrieved[sic]? A. I don't know if they heard, it was in response to a conversation Allen and I had in reference to what could be done, you know, about the situation

because of what happened to the ladies. And that's when I explained to him, you know, what, in my opinion, I thought could be done. And that's when the idea of legal representation could be sought or litigation could be sought. But that was explained [107] to Mr. Allen. I do not know who was present at the time, you know, people were coming and going and I don't know who was in the room at the time, but this was not told to the group that they could, you know, persue [sic] litigation, that I was recommending them to persue [sic] litigation.

Q. I believe you indicated that following the meeting up until the 30th of August that you had no other communication with Mrs. Williams? A. That's correct.

Q. In any case or form? A. Not directly, right.

Q. When were you admitted to the South Carolina Bar? A. In September, 1972.

Q. You were a member of the South Carolina Bar in 1973? A. That's correct.

Q. And you have been a member since your admission? A. Yes.

Q. Do you practice in the State Court? A. I have had a few cases in the State Court and some in the Federal Court.

Q. You practice in both of the courts, the United States District Court and the State Court? A. That's correct.

Q. I assume this was true in 1973? A. I was not a member of the District Court until either [108] November or October '73. I was a member of the State Supreme Court at that time.

MR. MCCUTCHEN: I think that's all.

EXAMINATION:

QUESTIONS BY MR CRUM:

Q. With reference to this law firm here, did you specify as to how -- where the funds came from by which you operated this firm? A. When the group was formed requests or proposals were into foundations for funding -- and there were two persons who had foundation money at that time. And when we realized we weren't going to get funded fully, we changed the name.

Q. Well, to continue your funding you would have had to have produced results, wouldn't you? A. There were several cases pending, I think, primarily in Federal Court.

Q. In other words, you would have had to have had litigation, really, to make this firm successful? A. What?

Q. To keep your funding up, to get funds to operate the firm, you would have had continued to represent somebody, have litigation going, wouldn't you? A. We did have two persons who were getting money or getting foundation support. And, I guess, we were hopefully looking for other money to come in.

[109] Q. But you couldn't have gotten it unless you had clients to represent? A. Pardon.

Q. You couldn't have gotten funded unless you had clients to represent? A. Yes. Well, there were cases pending before the group got together on various issues involving welfare issues, prison, consumer issues, as such. And I think those were the basis of the requests to the foundation because of those kind of cases we were presently doing.

REDIRECT EXAMINATION

QUESTIONS BY MR. MCDONALD:

Q. What sort of functional arrangements do the people in the law firm presently have? A. Each person receives his or her own fees and we share expenses.

Q. It's just an expense-sharing arrangement? A. We share office expenses



and we pay the expenses. Each person gets his or her own income. There is no division of income.

Q. I believe, in response to one of the questions put to you by a member of the Panel, you talked about someone who wished to do a magazine article about the sterilization, is that the Biz [sic Ms.] Magazine? A. Yes.

[110] MR. KALE: Objection, he is leading the witness.

MR. MCDONALD: Well, I'm asking her whether or not MRS [sic Ms.] Magazine -- do you know whether or not MRS [sic Ms.] Magazine contacted the national ACLU and sought to have an interview with the women in Aiken? A. That was my understanding.

Q. And that is what is involved in the incident you testified in response to a question from one of the Panel members? A. That's right.

MR. KALE: I would like to ask a couple of questions, if I may, also.

RE CROSS EXAMINATION

QUESTIONS BY MR. KALE:

Q. Who were the members of the Carolina Community Law Firm at the time in 1973? A. What time in 1973?

Q. Say August 30? A. August 30, Herbert Buhl, I think, Carlton Bagby and I were the three.

Q. Is Carlton Bagby an attorney in the case of Doe v. Pierce? A. I don't know, I will have to see the Complaint to see if he is listed there.

Q. Were there any other ACLU attorneys [sic] present in Aiken on July, 1973, when you had your discussion with Mr. Allen in his trailer? [111] A. No, there wasn't.

Q. You were the only person there who had any affiliation with the ACLU? A. I was the only person there whom I knew to be a member of the ACLU.

Q. I believe it was your testimony that subsequent to that time there was a decision made that the ACLU would sponsor class action in this case? A. There was a decision made by the board -- communicated to me by one of the board members of the ACLU that they were interested in getting involved. I do not know exactly what date that was but the ACLU had received a request that was discussed at their board meeting.

Q. You were a member of the board at that time? A. Yes.

Q. Were you vice president, at that time? A. Yes, I was.

Q. Did you talk to members of the board prior to their meeting? A. I do not recall if I did. I may have had conversation with various members, either members of the board -- the board meetings are open to other members. I don't recall if I discussed it with specific board members.

Q. Were they [sic] conversations in reference to what you had found out or what had occurred down in Aiken in July? A. In fact, I talked to a board member after they called me. [112] I had talked to the Counsel [sic], I had made a report to them.

Q. You made a report to the Counsel [sic] of the ACLU? A. No. There are two separate organizations.

Q. Okay. A. I did not make a report to the ACLU. When the request -- Mr. Allen asked about representation I told him the office of the ACLU was an organization that could render legal services to the individual. And the letter was sent in. And this matter was discussed at a board meeting. And the decision of the Board was communicated to me by a member.

Q. Do you know if the Board had access to your report that you had made to the

Counsel [sic]? A. I don't think it did.

MR. KALE: I have no further questions.

MR. MCDONALD: Our character witnesses will be extremely brief.

GERALD M. FINKEL, a witness on behalf of the Respondent, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

QUESTIONS BY MC. MCLAIN [sic]:

Q. Mr. Finkel, what's your occupation? A. I'm an attorney at law.

Q. And what states are you admitted to practice? A. In South Carolina and the District of Columbia.

Q. Are you a member of any Federal Bars besides the District [113] of Columbia? A. Yes, the U.S. Supreme Court.

Q. And the District Court here? A. The District Court here and the Fourth Circuit Court of Appeals.

Q. How long have you been practicing law? A. Four and a half years.

Q. Where have you had your practice? A. In Columbia, South Carolina.

Q. For the past four and a half years? A. That's correct, sir.

Q. In the course of your practice

have you come to know Edna Smith? A. I do.

Q. And how long have you known her?

A. I've known her since she entered law school and I think that was about 1969, about.

Q. Have you had occasion to become familiar with her reputation in the Bar --  
A. I have.

Q. -- in this community? What is that reputation? A. It's outstanding.

Q. Are you familiar with her reputation for truth and veracity in this community? A. Yes, I am.

[114] Q. What is that reputation?  
A. It is also outstanding.

Q. Do you know her reputation among members of the Bar in this community for ethical practices? A. Yes, I do.

Q. What is that reputation? A. I think she adheres to the highest ethical practices the profession could expect.

Q. And do you personally have any knowledge where she could have made an attempt to solicit or stir business to herself and did not do so? A. Yes, I do.

Q. Could you just relate those briefly to the Panel?

MR. KALE: I don't know what the relevance of this is, we are getting far afield

from character.

MR. MCCUTCHEN: I think so. I think the witness can state generally about her reputation but I think the details are probably not proper.

MR. MCLAIN [sic]: Can I make just a brief offer?

MR. MCCUTCHEN: Yes, sure.

MR. MCLAIN [sic]: We would prove through this witness that in a piece of litigation in which he represented some twenty members of the faculty at Allen University in dispute with the university he knew Miss Smith, who was also a faculty member at Allen University, had an opportunity [115] to undertake the litigation and had an opportunity to stir it in her direction but refrained from doing so and, in fact, assisted him in some respects in that litigation without any compensation to herself.

MR. KALE: Your Honor, I still don't see what the relevance in this particular proceeding would be.

MR. MCCUTCHEN: Well, I think we have already indicated that the details are not relevant. It was solely his offer of proof in the record, but we haven't accepted it



as a part of the record.

MR. MCLAIN [sic]: That's all, thank you, Mr. Finkel.

CROSS EXAMINATION:

QUESTIONS BY MR. KALE:

Q. Mr. Finkel, are you a member of the ACLU? A. No, I'm not a member. I acted as a cooperating attorney on occasion.

Q. Were you involved in Doe v. Pierce? A. No, I was not.

Q. Did you consult and talk with Miss Edna Smith about the case of Doe v. Pierce? A. No, sir, I did not.

MR. KALE: I have no further questions.

MR. JASPER M. CURETON, a witness of lawful age, having been duly sworn, testified on behalf of the Respondent.

DIRECT EXAMINATION:

[116]

QUESTIONS BY MR. MCLAIN [sic]:

Q. Would you state your name, please, sir? A. I'm Jasper Cureton.

Q. And what is your occupation, Mr. Cureton? A. I'm an attorney.

Q. And what states are you licensed to practice? A. South Carolina.

Q. Are you admitted to any federal court bars? A. Yes, sir, I'm admitted to

the District Court and the Court of Appeals.

Q. Fourth Circuit? A. Yes.

Q. How long have you been admitted to practice in South Carolina? A. I was admitted in 1967.

Q. And have you been practicing in South Carolina since that time? A. Yes, sir.

Q. Where in South Carolina? A. Columbia.

Q. Throughout the entire period? A. Yes, sir.

Q. And in that time have you come to know Miss Edna Smith? A. I have.

Q. Approximately how long have you known her? A. As I recall that I first met Miss Smith in 1965, when I was [117] in law school at USC and she was in undergrad school there.

Q. So you have known her throughout her years as a law student and in practice? A. Yes.

Q. In the Columbia area have you come to know her reputation at the Bar? A. I have.

Q. Can you tell us what that reputation is? A. That reputation is excellent.

Q. Do you know what her reputation is in Columbia for truth and veracity?

A. Yes.

Q. In the Community here in Columbia?

A. Yes, I do.

Q. And what is that? A. That is also excellent.

Q. Do you know her reputation for ethical practices at the Bar? A. I do.

Q. What is that reputation? A. That is very good.

MR. MCLAIN [sic]: Thank you, very much. Answer any questions the other counsel has.

CROSS EXAMINATION:

QUESTIONS BY MR. KALE:

Q. Mr. Cureton, do you practice here in Columbia? [118] A. Yes, I do.

MR. KALE: I have no further questions.

MR. MCCUTCHEN: Let's try to get back at 2:30, that's about an hour.

(recess)

MR. MCCUTCHEN: All right, sir.

MR. MCLAIN [sic]: Mr. Chairman, while we are waiting for Mr. McDonald to come back with Mr. Pollitt, I wonder -- I think the Attorney is willing to enter a stipulation with us; that the character testimony of Mr. I.S. Levy Johnson, who is a member

of the Richland County Bar and has been for a period of some years, and also a member of the House of Representatives from Richland County, who, if he was called to testify, would in response to the questions that were asked Mr. Cureton, give the same answers Mr. Cureton did to those questions. Is it so stipulated?

MR. KALE: Yes, it is.

MR. MCCUTCHEN: Let the record so show that it is stipulated by Counsel that Mr. Levy's testimony in so far as character is concerned would be the same as the prior two character witnesses.

DANIEL H. POLLITT, a witness on behalf of the Respondent, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

QUESTIONS BY MR. MCLAIN [sic]:

[119] Q. Mr. Pollitt, would you state your full name for the Panel? A. Daniel H. Pollitt, P-O-L-L-I-T-T.

Q. What's your present employment, Mr. Pollitt? A. I'm professor of law at the University of North Carolina School of Law.

Q. And are you also admitted to the Bar? A. Admitted to the New York Bar, the

District of Columbia Bar, the Supreme Court of the United States Bar, the D.C. Court of Appeals Bar and the Fourth Circuit.

Q. And when were you first admitted to the practice of law? A. 1949.

Q. And have you been either in practice or academic positions related to law since that time? A. Yes.

Q. Now, how long have you been in your present position? A. For 18 years, since 1957, at the University of North Carolina.

Q. And what fields of law do you specialize in? A. For the last ten years, or so, I taught the courses in constitutional law and in labor law. And I teach seminars[sic] in the current Supreme Court decisions and in the administration of criminal justice.

Q. And have you had any other academic employment in law school? A. Prior to going to the University of North Carolina I taught at the University of Arkansas for two years. And prior to that time, prior to 1955, I was practicing law in Washington, [120] D.C. and I taught parttime at night at American University in the District of Columbia.

Q. Have you been a visiting professor at any time? A. Yes, I have visited at the University of Oregon. And on one occasion, for a year, and I have visited at Duke University on three or four occasions.

Q. Have you written any articles in professional publications? A. Yes, I have written approximately 45 to 50 articles generally on matters of topical interest in the areas of civil rights and civil liberties.

Q. Have any of these articles related to the problem of obtaining representation for unpopular causes? A. Yes, two of them did. One was in 1964. One was published in Harpers Magazine and the other one was published in the University of North Carolina law review.

Q. Do you have any personal experience with the representation of unpopular clients or causes in the civil liberties area? A. I've had a great deal of experience.

Q. Could you just recount that for the Panel, please? A. Yes. I graduated from law school in 1949, and I spent a year as a law clerk for Judge Henry W. Edgerton of the United States Court of Appeals for the District of Columbia. And then I went into law practice with the



law firm headed by Joseph L. Raugh, R-A-U-G-H. And Mr. Raugh, at that time, was the Chairman of the Americans for Democratic Action and [121] he was also the counsel to the United Auto Workers.

MR. MCCUTCHEN: Counsel, is there any question about the gentleman's qualifications? I assume --

MR. KALE: No question about qualifications, I do have a question about the purpose of this testimony.

MR. MCCUTCHEN: Well, I'm not at all sure of the extent to which it's going. But I take it these questions were directed primarily to the matter of qualification.

MR. MCLAIN [sic]: If the Attorney General would stipulate that Mr. Pollitt is qualified as an expert in the area of civil liberties practice and in problems of obtaining representation for unpopular causes we don't need to put his qualifications in that regard in the record.

MR. MCCUTCHEN: I realize you have some question as to the extent to which this goes, but insofar as his qualifications are concerned is there any question?

MR. KALE: I don't have any qualifications as to his expertness in constitutional and civil rights. I don't know how

he can be an expert in unpopular causes but I would so stipulate.

MR. MCCUTCHEN: Very well.

THE WITNESS: I would be glad to explain briefly how you can become an expert in getting lawyers for unpopular causes as that's been a great concern of mine for twenty years.

[122] Q. (By Mr. Mclain [sic]) Could you recount -- are you presently associated in any way with the ACLU? A. I am a member of the North Carolina Civil Liberties Union. I am the past President of the North Carolina Civil Liberties Union. I was one of the charter members of the North Carolina Civil Liberties Union.

Q. And have you had occasion to assist the North Carolina Civil Liberties Union with obtaining representation for persons? A. On many, many, many, many, many occasions, most recently being yesterday morning.

Q. Could you -- does this experience include situations in which persons have made inquiries on behalf of other persons for assistance from the American Civil Liberties Union? A. Many occasions.

Q. Could you recount some illustrative examples to the Board? A. Yesterday morning --

MR. KALE: I don't know what the relevance of this is.

MR. MCCUTCHEN: Well, I'm inclined to agree with counsel. I think he has indicated the basis upon which he proposes to offer his testimony as an expert. And apparantly [sic] the record indicates that there is a stipulation as to his activities and qualifications in this area. And I don't believe that the particulars of the instances, or example, is [123] relevant, and I sustain the objection.

MR. MCLAIN [sic]: All right, thank you, Mr. Chairman. We would simply offer to prove through this witness that he has on many occasions received inquiries from disinterested parties to the American Civil Liberties Union requesting that the Civil Liberties Union offer assistance to other persons who have not actually contacted the Civil Liberties Union or may not have contacted anyone at all. And in response to that he either himself, or through other attorneys, offered the services of the American Civil Liberties Union to the aggrieved [sic] parties in those situations. As in circumstances that occurs [sic] quite frequently in the process of providing counsel to persons who

are not equipped by reason of education or for other disabilities to make the request on their own for this assistance.

MR. KALE: I might ask what purpose the offer of proof is made? If it tends to try to admit this into evidence or for what purpose?

MR. MCLAIN [sic]: We would offer that as testimony of this witness. I assume that the Panel has already ruled that that's not relevant but for the record we would admit that in evidence.

Q. (By Mr. McLain [sic]): Now, in your experience is it an easy matter to obtain counsel to represent persons in unpopular causes? [124] A. Very difficult.

Q. And in what localities have you found that to be the case? A. North Carolina and most of our localities outside of the major cities. I also found that to be true when I was in Oregon where there was a controversial matter about church and state. I found that to be very true in Washington, D.C. during the early 1950's, during the McCarthy period when there was a lot of litigation under the loyalty security program.

Q. Are you familiar in your experience with disciplinary actions which have

been initiated against attorneys who have represented unpopular clients? A. One personal experience, the rest of it is through scholarly research.

Q. What is the effect, in your opinion, of such disciplinary action against attorneys representing unpopular causes?

MR. KALE: I'm going to object at this point. I don't think this is an area in which the witnesses can testify. I think the question of solicitation is a matter for this panel to decide. And it appears that his testimony is offered for his expert opinion as to what the status of the law is on solicitation. And I don't think that's relevant, I think that's usurping the duties and functions of this Panel.

MR. MCLAIN [sic]: With all respect, Mr. Chairman, we are [125] simply attempting to elicit, at this point, the witness' opinion as to the effect which disciplinary proceedings against attorneys who undertake to assist in providing representation for unpopular clients, will have on unpopular clients obtaining such representation in the future. And I think that's an evidentiary fact which can and should

be in this record.

MR. KALE: I don't see the relevancy of it.

MR. MCCUTCHEN: Well, I think the Panel is inclined to agree. Of course, insofar as the decisions are concerned the Panel may not be as capable, perhaps, as my friend to interpret them but they are matters of public record. I think we can determine the decisions that are made. I don't think the Panel feels that this is an area that is really embraced within this particular proceeding.

MR. MCLAIN [sic]: Mr. Chairman, if I can try to focus on the particular question that I was asking the witness at this point; and that particular question is, as a matter of evidentiary fact, not as a matter of legal conclusion, but as a matter of evidentiary fact from his experience of what is the effect of disciplinary proceedings against attorneys who have tried to assist in providing representation for unpopular clients.

MR. MCCUTCHEN: Well, I don't think that has any bearing on the issue that we are trying, the effect that it [126] may have, the inquiry [sic] as the Panel



apprehends it is the narrow question of whether or not the Respondent, in this instance, was guilty of the charge that was made, and that's solicitation. Now, what effect disciplinary proceedings have I don't think is germane to the issue.

MR. MCLAIN [sic]: Well, we would offer then, again, Mr. Chairman, for the record, with your permission. We would simply state that we would offer to prove through the witness that the instigation and particularly the administration of discipline, but even without the administration, simply the instigation of disciplinary proceedings against attorneys who have been associated with assisting in providing legal counsel for persons who have causes and legal problems which are unpopular in the community has the effect of making it even more difficult than it is at the present time, and has always been, to obtain counsel for similarly situated clients and persons in the community in the future. And we simply would tender that as an offer that we would prove through this witness.

MR. MCCUTCHEN: Well, the record will show that you have tendered the proof, and I think it will show the basis for which

you have tendered it. The Panel is still of the opinion that this is not a matter that is germane to the issue that we are called upon to decide.

Q. (By Mr. Mclain [sic]) Mr. Pollitt, with respect to the administration [127] of justice and the protection of rights in the community, what is the effect of limiting the access of persons in the community, particularly those of limited means and ability, to legal regress [sic]? What is the effect on the administration of justice?

MR. KALE: I'm not sure if that's not the same question rephrased a different way. It's still going into the effect, so-called effect of disciplinary proceedings on unpopular causes.

MR. MCCUTCHEN: Counsel, what really is the purpose of this line of questioning insofar as this particular proceeding is concerned?

MR. MCLAIN [sic]: Mr. Chairman, the purpose which we have is to establish, as a matter of evidentiary fact, in this record the result -- the predictable result of the administration of discipline particularly if there is any -- if the case is even close, if there is any question that the case is close. And we feel that the

evidentiary fact that such discipline will deter the availability of legal services and the availability [sic] of legal information to the general public, particularly those parts of the public who are underprivileged with respect to knowledge, information and financial means, that that is a consideration which should be relevant to determine whether any discipline ought to be administered. And, in fact, in determining whether or [128] not the conduct which was alleged to be in violation of the Canons was protected or not. In both instances we suggest it's relevant.

MR. MCCUTCHEN: To be perfectly frank, counsel, Panel is of the opinion that within the narrow limit of our inquiry [sic] that that would not be germane to the purpose for which we are sitting. And we really don't see that this would determine the outcome of this particular proceeding at all.

MR. MCLAIN [sic]: All right.

MR. MCCUTCHEN: We are concerned with this question as to whether she is guilty of this particular charge that's made. And it seems to me that this is beyond the scope of our inquiry [sic].

MR. MCLAIN [sic]: Let me offer then, Mr. Chairman, just one final offer of proof from this witness with respect to that particular line of questioning. And that offer is that this witness would testify that it is on occasion necessary for attorneys to make available, to take initiative [sic] and make available to aggrieved [sic] persons both information as to their legal rights and as to availability of legal counsel from organizations such as the American Civil Liberties Union to assure that the rights of inarticulate economic disadvantaged persons are vindicated. And that, in fact, because such initiatives are not taken on more occasions there [129] are a whole host of legal rights, constitutional and other civil rights, which are not vindicated because attorneys do not -- and other persons, do not, in fact, take initiative [sic] to apprise the public both of the fact of a legal wrong having been committed and of the availability of counsel to assist in the redress of that wrong. If the Panel's ruling as to that material is the same I will simply offer that as an offer of proof and move on to another area.

MR. MCCUTCHEN: This is the feeling of the Panel, and we understand the purpose for which you have offered it and the offer of proof is in the record so that you are protected on that. The Panel feels that it's beyond the scope of this particular inquiry [sic].

MR. MCLAIN [sic]: All right, Mr. Chairman, not to provoke a further objection from my opposing counsel, is it also the Panel's opinion -- I believe you just expressed a moment ago -- that the Panel would not receive testimony from this witness as to his conclusions from a hypothetical question stating the facts as developed in this particular proceeding as to whether or not that constituted improper conduct or, in any sense unethical conduct under the disciplinary rules.

MR. KALE: May it please the Panel, if I may be heard on this. I think this situation would be similar to a prosecutor being able to put up his expert on criminal law [130] and testify to the judge and jury as to whether this man committed murder or not. I think, in so doing, you would have usurped the function of the jury. And I think that's what we are here today, and what this Panel -- the question the Panel

has here today is this solicitation under the law of the State of South Carolina. And I just don't believe that this is something that you can testify to. I think this is the Panel's and only the Panel's decision.

(discussion off the record)

MR. MCCUTCHEN: The Panel is of the opinion that that's a matter that is within the province of the Panel, that's what we are here to determine. And I don't believe the expression of opinion of the witness would be proper.

MR. MCLAIN [sic]: All right. If the Panel would simply note our position is that our understanding of the law is that the point of qualifying the person as an expert is to allow that person to make a judgment for the finder of facts as to ultimate questions; therefore, that the objection of the Attorney General is not well taken.

MR. KALE: You Honor, may it please the Panel, I would point out that the Respondents have filed a brief stating their position in this matter.

MR. MCCUTCHEN: Yes, sir.

MR. KALE: So they have before the



Panel their feelings of what the state of the law is in this brief. [131]

MR. MCCUTCHEN: Well, I think these are matters, particularly decisions in this area are numerous and I think we can read them. I think this is a matter of interpretation and I think we are in an area now that I don't think justifies testimony with reference to the matter of an opinion of an expert within this particular area. You may tender your proof for the purpose of protecting your record.

MR. MCLAIN [sic]: All right. If permitted to do so I would ask Professor Pollitt if, under the following circumstances, and the attorney involved in the following set of circumstances was guilty of impropriety. The first set of circumstances is; that an economically disinterested party requests an organization to investigate an alleged violation of personal rights of other persons known to the disinterested party, that an attorney at the request of the organization which had been contacted then contacted the disinterested party and meets with both the disinterested party and the agrieved [sic] persons to investigate the matter, and the

attorney, at that time, informs the agrieved [sic] persons of what their legal rights are and the fact that in the attorney's opinion there would be certain means to obtain legal redress for those rights, but the attorney makes no offer of legal assistance [sic]; the attorney subsequently receives a request from one of the agrieved [sic] parties to help [132] secure representation, and is also told by the disinterested party that the other agrieved [sic] parties wished to secure representation but had not requested it because they are inexperienced in correspondence; the attorney is then told by representatives of the state and federal American Civil Liberties Union that that organization is willing and able to provide representation for persons in a situation of the agrieved [sic] parties; and the attorney finally writes to one of the agrieved [sic] parties who has not directly requested assistance [sic], a letter of the substance of the letter that's before this Panel, that the American Civil Liberties Union pay no counsel fees for such undertaking such litigation nor receives any contingent compensation or any other compensation from agrieved [sic] parties

for undertaking such litigation unless such compensation might be awarded by the court; and that the witness' response to that question would be that the attorney is not guilty of any impropriety or any improper conduct.

Then I would ask the same question changing only the assumption that at the initial meeting of the agrieved [sic] parties the attorney, in fact, made an offer of personal legal assistance [sic] but not for any compensation or fee. And the witness' response to that hypothetical would likewise be that the attorney is not guilty of impropriety or any improper conduct. [133]

MR. KALE: If it please the Panel, based upon his offer of proof I would like to make or enter into the record a further objection of the relevancy since it does not conform to the facts as we feel they have been presented at the hearing.

MR. MCLAIN [sic]: It's my understanding, Mr. Chairman, is that an objection of any sort to be well taken must specify the omissions so that we can include them in the hypothetical. We would be glad to include any specified omissions

at this time if the Attorney General would like, if you so desire.

MR. KALE: We feel like there was no proof that there was any inability upon these parties to correspond with American Civil Liberties or anyone else that they desired to contact. We do not feel like there has been any testimony which substantiates these alleged contacts since there was no admission into evidence of certain letters which they say were written, which we objected to because they weren't presented. That would be sufficient.

MR. MCLAIN [sic]: Mr. Chairman, we would simply state that if the witness were asked the hypothetical question with those additional assumptions that his answers would be the same.

MR. MCCUTCHEN: Yes, I understand that.

MR. MCLAIN [sic]: Just one further area, Professor [134] Pollitt. Are you familiar with the practice of the American Civil Liberties Union on occasion requesting an award of attorneys' fees as part of the relief requested in litigation which it brings?

THE WITNESS: Yes, I am.

Q. (By Mr. McLain [sic]): Do you know the purpose of that policy? A. Yes, I do.

Q. Would you state that for the Panel?

A. There are two primary purposes; first, it's a deterrent against continuing violation of the constitution. The award of attorneys' fees is a deterrent. The second prime purpose is to encourage other attorneys to undertake these cases since there will be the promise of financial reward.

Q. Now, have there been -- are there areas of the law where the provision for court-awarded attorneys' fees has had the effect of stimulating other counsel to enter? A. Yes, there has been.

Q. Could you give some examples? A. Yes. One is Title 7 of the Civil Rights Act which has to do with employment discrimination. At one time the North Carolina Civil Liberties Union had a number of such cases. Now, we no longer have any cases because attorneys' fees are awarded automatically. The other area is housing discrimination. We had a lot of housing discrimination initially. Now, that the attorneys can generally get [135] attorneys' fees we have no trouble finding attorneys to take them all apart from the North Carolina Civil Liberties Union.

MR. MCLAIN [sic]: Just a minute, Mr. Chairman. I have no further questions, Mr.

Chairman. Answer any other questions Mr. Kale has.

CROSS EXAMINATION:

QUESTIONS BY MR. KALE:

Q. Mr. Pollitt, did I understand you to say that the awarding of attorneys' fees has induced persons to represent actions for the ACLU because of the promise of financial gain? A. No. It relieves us of the obligation to take these people because they can now get private attorneys.

MR. KALE: I have no further questions.

MR. MCCUTCHEN: The Panel has no questions.

(Thereupon the witness was excused)

CHARLES LAMBERT, a witness on behalf of the Respondent, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

QUESTIONS BY MR. MCDONALD:

Q. What is your name? A. Charles Lambert?

Q. And where do you reside, Mr. Lambert? A. Thomasville, North Carolina.

Q. And what's your occupation there? [136] A. I'm a lawyer.

Q. How long have you been so employed in North Carolina? A. Since 1953.



Q. Where did you go to law school?

A. The University of North Carolina.

Q. Do you have any association, or have you had any association, with the American Civil Liberties Union? A. Yes, sir, I have. I was the first President of the North Carolina Civil Liberties Union which was organized in 1965. I was the President for approximately three years. During that period of time I was also a member of the National Board of Directors of the American Civil Liberties Union. And, at the present time, I am a member of the North Carolina Civil Liberties Union as a member of the board of directors.

Q. What are your duties as a director of both the national board and the North Carolina ACLU Board? A. Well, first the North Carolina Civil Liberties Union we have a board meeting every two months. And at this meeting we -- first of all we are elected by the general membership just like a corporation, shareholders except it's one man one vote there, and we elect the officers, the directors do. The directors also appoint a staff counsel. We have one staff counsel, we have one executive director and one secretary. There are only

three paid employees in the [137] North Carolina Civil Liberties Union. The directors consider various cases that might be accepted by the North Carolina Civil Liberties Union as cases; that is, whether or not there is substantial civil liberties question involved in a particular case. We have many requests for assistance [sic] both from -- well, we get them from everywhere, by telephone, by mail or personal contacts. And when these are considered to be of sufficient movement we bring them before the Board of Directors and the Board, in open debate, decides whether to accept the case. Also at the Board of Directors meetings we discuss housekeeping duties such as fund raising and also things like, well, everything that pertains to the operation of the business just like any other organization might. Well, we have an education program, a legislative program. We actually have a committee to study legislation from the North Carolina Legislature. We make suggestions, we have a lobbyist. He is asked to testify before the committees in the North Carolina Legislature. And occasionally if we have anyone who has a specialty or a field of

expertise he is asked to appear before the North Carolina Legislature -- committee, right. Excuse me.

Q. I was just going to ask you about your duties as a national board member.

A. Well, the national board, at the time I was a member, met five times a year. It met for two days, [S]aturday and [S]unday, [138] and it met in New York City at some hotel. They had rented a room large enough to accommodate the board of directors. These directors came in from the various states. Nearly every state in the union has an affilliate [sic] now. And these affilliates [sic], state affiliates often have chapers [sic] in various cities in the state. That's true in North Carolina, I believe we probably have six or seven chapters in the various cities. But the affilliate [sic] is entitled to a representative on the national board, at least one. And there also are elected to the national board membership candidates at large who are not members of an affilliate [sic] but who is just nominated. And these people are elected by the membership at large. The board meets and it considers policies of the board. The board rarely takes up a

case by case consideration because there are so many cases involved. They do establish policies at those meetings. The meetings are open --

MR. MCCUTCHEN: Mr. McDonald, what is the relevancy now? He has gone pretty well into the operations of these various organizations. What's the relevancy of this particular testimony to the issue that we have got? We are really not trying the organizations of which he is a member, or we have no questions about the propriety of their operations or methods. What's the relevancy that that has to our particular inquirey [sic]? [139]

MR. MCDONALD: I just wanted to establish, one, that he is qualified to speak about the operations of the ACLU. And then I want to ask him about the policies with regard to reimbursing attorneys, whether or not they receive fees, and so forth.

MR. MCCUTCHEN: Well, I think he has pretty well related what he has done. And I don't see that it would serve any purpose, really, to continue --

MR. MCDONALD: All right, sir.

MR. MCCUTCHEN: -- these various types of activities.

Q. (By Mr. McDonald) All right, sir, let me ask you then -- I assume there is no question about his ability to speak as an expert then about the practice of the ACLU, I would assume, from the Chairman's determination of the qualifying -- Mr. Lambert, what is the policy of the --

MR. MCCUTCHEN: Well, I don't know that the Panel has expressed any opinion about his qualifications. We are simply having some difficulty in relating these various activities to the issue that we are to determine.

MR. MCDONALD: Well, I was going to ask him what the policies of the ACLU are about attorneys' fees and I want to make sure that it clearly appears that he knows what the policies are.

MR. MCCUTCHEN: Well, I think you may ask him about [140] the policy. I think this is what you asked the last gentleman.

MR. KALE: If it please the Panel, I think he can testify to facts. What opinions are, whether the President of the corporation has an opinion goes on I don't know if that's relevant or not, but I'm sure he can testify as to the facts he knows of his own personal knowledge, we would not object to that.

MR. MCCUTCHEN: Well, I would assume that this is what he was going to say, of his own knowledge, what they did with reference to payment or nonpayment of fees.

Q. (By Mr. McDonald) What is the policy of the ACLU's regarding -- before I ask you that question let me ask you this: You talked about a staff attorney. Tell me how the ACLU undertakes to secure representation for individuals? A. You mean so far as cooperating attorneys are concerned?

Q. Yes, and I'm asking you about staff attorneys as well. A. Right. Well, as I said, we have one staff attorney who is employed by the North Carolina Civil Liberties Union whose income is derived from dues prescribed by membership. The staff attorney is paid a salary. I have forgotten what it is now, it was \$150.00 a week but I'm not sure what it is right now. The staff attorney receives nothing other than this salary. We have in North Carolina a number of cooperating attorneys. I would estimate that we have at [141] least 30 that we can count on regularly. And in specific areas, or for specific cases, we get assistance [sic] from others. None of these cooperating attorneys are allowed any fee whatsoever.



That's provided in the policies of the ACLU and the North Carolina Civil Liberties Union. They are allowed out-of-pocket expenses such as travel and overnight accommodations but they are not allowed to receive any compensation. If they were the ACLU and the NCLU would not long stay in business because of the tremendous amount of attorneys fees that would be involved. So we survive because the attorneys contribute their services gratuitously.

Q. What happens if attorneys' fees are awarded by the court in a case in which the cooperating attorney is involved? A. The cooperating attorney receives none of this fee in case of award by a court of attorneys' fees in some case. They are not allowed to accept it; the purpose of that being it's thought that it might become selective of clients if we did that. It's a good policy not to do it. The client is not even allowed to pay the cost of court because even that might make us more selective whether it would or not, so we don't do that either. An award of attorney's fee, as I understand it, is paid to the organization itself but not to any attorney. In North Carolina I don't know

of any attorneys' fees we have been awarded, we may have but it's been a very insignificant portion of the budget. [142]

MR. KALE: May it please the Panel, if he is testifying as to what goes on in North Carolina I don't see what the relevance to this particular proceeding is.

MR. MCDONALD: Well, your general observations about the disposition of attorneys' fees is part of the national policy.

THE WITNESS: Yes, this is a national policy.

Q. (By Mr. McDonald) What about awards of damages, what's the disposition of that?

A. The damages all go to the client. The attorney nor the organization receive any portion of that, of the damage award.

Q. Now, does the American Civil Liberties Union believe that it has -- well, what is the purpose of the organization, the American Civil Liberties Union? A. Well, the purpose of the organization is to advance and defend the cause of civil liberties under the protection of the United States Constitution.

MR. MCCUTCHEN: Counsel, I think we have indicated before that we really have no bones to pick with the ACLU and we are not trying them. The Panel really doesn't see that the purpose of that organization is an issue in this lawsuit at all, we are not trying this organization or the North Carolina chapter.

MR. MCDONALD: That would go, Mr. Chairman, I [143] think, to the question of whether the activities of the Respondent were protected in that at some point they were on behalf of an organization specified in the Canons as clearly having an obligation and certainly the right to advise members of the public to their legal rights and remedies and to make counsel available to them and to even accept employment, I might add, which grows out of those activities. And I just want to establish that the ACLU does have that as its purpose. And that would be the sort of information which we would try and get into evidence through this witness' testimony.

MR. MCCUTCHEN: The Panel has concluded that that particular line of questioning really isn't relevant. We are concerned here with the Respondent, Edna

Smith. And I don't think the underlying purposes of the American Civil Liberties Union really is germane to this inquiry [sic] at all.

MR. MCDONALD: All right, sir. We would simply then, with your permission, offer to show that this witness would testify that the ACLU is in the nature of a legal aid or public defender office, and that it is operated and sponsored by a legitimate nonprofit organization. And that one of its purposes is to educate layman as to their rights and their remedies and to make counsel available to them.

MR. MCCUTCHEN: Is there any question in your [144] mind that that's the purpose? I don't know what relevance it has. Isn't this a matter that there isn't any dispute about.

MR. KALE: I don't have any dispute about it.

MR. MCCUTCHEN: The Panel is still of the opinion that right now we don't see the relevance of it. I don't know that there is any dispute as to what it is or what it does or what its purposes are.

MR. MCDONALD: All right, sir.

MR. MCCUTCHEN: And it seems to me we

could shorten this type of thing by simply stipulating, for whatever it's worth, that this is what the American Civil Liberties Union is, this is its purpose and this is what it does.

MR. MCDONALD: All right, sir. There would be one other matter in which I think the same objection of relevance would be made and probably sustained by the Panel; and that is the impact which the witness has observed that the ACLU has had on securing access to individuals with constitutional grievances and redress thereof; and that through the activities of the ACLU individuals have, with greater frequency, been able to seek redress of constitutional violations in the courts. And we would offer to prove that testimony from this witness.

MR. MCCUTCHEN: I think the Panel would take the [145] same as you have indicated. We take the same position that we stated earlier, that that's not an issue that we think is germane. You may state into the record your offer of proof.

MR. MCDONALD: All right, sir. Just one minute, please.

Q. (By Mr. McDonald) Do you have any knowledge of when the South Carolina Chapter

of the American Civil Liberties Union was formed? A. No, I do not.

Q. Now, does the ACLU have as one of its policies that in the absence of a specific request for representation that it has an obligation to advise persons of their remedies and to inform them of the willingness of the Union to secure representation for them? A. Yes, in certain cases of great import they do, they have an obligation to.

Q. Is it the Union's judgment that it is protected in that regard by --

MR. KALE: Objection.

MR. MCCUTCHEN: Yes, sir, the Panel sustains the objection.

MR. MCDONALD: All right. Well, we would just simply offer to show that this witness would testify that the ACLU relying upon cases such as NAACP v. Button and the [146] cases which followed, the trainman's case and the mine worker's case, that the ACLU regards that that authority for the ethicality and the constitutionality of their position as a guide.

THE WITNESS: If I might add, Your Honor, that is specifically set out in the policy guide of the ACLU and it relies,



for that policy, upon NAACP - Button and several cases following it.

MR. CRUM: Are those policies in writing?

THE WITNESS: Yes, sir.

MR. MCDONALD: I direct the Panel's attention to page 8 of our memorandum.

MR. MCCUTCHEN: We have seen it.

MR. MCDONALD: It's set out. Thank you, very much, Mr. Lambert. Would you answer any questions Mr. Kale may have?

CROSS EXAMINATION:

QUESTIONS BY MR. KALE:

Q. Mr. Lambert, I believe you were asked certain questions about what the ACLU does with the attorneys' fees. Does this go into the ACLU organization? A. The attorneys' fees goes into the organization and not to the attorney.

Q. And it's used for the benefit of the organization? A. Yes, sir.

[147] Q. And a primary purpose of the ACLU is litigation? A. That's one of the purposes, yes, sir.

MR. KALE: No further questions.

(Thereupon Mr. McLain [sic] was excused)

(discussion off the record)

GARY ALLEN, a witness on behalf of the Respondent, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

QUESTIONS BY MR. MCDONALD:

Q. What is your name, please, sir?

A. Gary Allen.

Q. And where do you reside, Mr. Allen?

A. 539 Chesterfield Street, Aiken, South Carolina.

Q. And how long have you been a resident of Aiken? A. I have been a resident of Aiken, in the city there, about twenty -- I've been in this location about 28 years, about 32 years. I've been in the county all my life, my days.

Q. Are you involved in any community affairs? A. Yes, I am.

Q. Tell me what affairs those are.

A. Well, I try to play the role of trying to help the poor people in the county, city, with problems from any form of discrimination, any violation of their rights we feel, help secure food stamps, social security, welefare [sic], or what not, help get people out of jail, you know, where we [148] feel their rights are being abused in any respect.

Q. Do you work with an organization?

A. Yes, I do.

Q. What's the name? A. One of them is the South Carolina Association for Improved Justice.

Q. And are there others? A. Yes. I'm the President of that operation. Also the United Christian Workers Association, also the President of that organization.

Q. Where are those organizations based? A. They are based -- South Carolina Association for Improved Justice is a state organization. And the United Christian Workers was organized there in Aiken County but, of course, we have members all over the state, you know, different parts of the state.

Q. What are the purposes of those two organizations? A. Well, the Association for Improved Justice mostly deals with the criminal system of justice, to try to see that people get fair trials, and that they are represented by counsel, they are not railroaded in court. And somebody is in jail we try to help get them out, get the judge to release him on his own recognizance or either try to get them out on a bond, somebody post a bond if it's necessary to

to get them out. I try to kinda work between the people and, [149] you know, the law and the court; try to make it easier for poor people because they just doesn't have the representation there in Aiken very much, the lawyers is --

MR. KALE: Objection as to any statements about lawyers in Aiken it's not relevant.

MR. MCDONALD: Well, we -- is it easy for the sort of people that you have just been talking about, minority groups and those with limited education, to get representation in your community?

THE WITNESS: No, it's not --

MR. KALE: Objection. I don't know what his qualifications are. He can speak from his own experience on anything he might have had but whether he can talk the problems other people have, I don't know, that would be a conclusion on his part.

MR. MCDONALD: Well, he is President and member of an organization for whom that is a major concern and I think he can clearly is competent to testify about that.

MR. MCCUTCHEN: The Panel still feels that this is, once again, an area that

really isn't involved in this particular proceeding, whether they are difficult to get or not difficult to get. We think the objection is well taken. You may offer --

MR. MCDONALD: All right, sir, I will just offer that this witness would testify that it's difficult for [150] minority people in Aiken County to secure representation particularly in unpopular causes where they have been agrieved [sic] by members of the majority community.

Q (By Mr. McDonald) Now, Mr. Allen, this other organization that you talked about, tell me what its purpose are. A. Well, the United Christian Workers, mostly we deal with people that have a problem with the weelfare [sic] department, you know, trying to get their checks; social security checks, unemployment checks, discrimination against jobs, any form of discrimination that we are aware of and brought to our attention we try to help, you know, bring about a change, you know, in our city.

Q. Do you work primarily then in the minority community in Aiken? A. Yes, sir.

Q. Now, do you know Marietta Williams? A. Yes, sir, I do.

Q. Tell me how you came to know her.

A. Well, I have been knowing Marietta for quite some time, I don't know exactly how long. I knew her mother. Well, I guess I have known her mother for 25 years, 30 years. And I just met there in Aiken, you know.

Q. Had you ever had occasion to consult or advise Marietta? A. Yes. During, I guess, about the latter part of Spring, early part of Summer, I talked to Marietta about this [151] sterilization thing that came out in the paper. I was informed that she was one that was victimized under sterilization, had been sterilized. So, at that time, I talked with her about this matter.

Q. What was the conversation that you had? A. Well, I -- she was somewhat upset. Her baby was in the hospital at that time and she was -- well, it appeared to me that she was angry, you know, and she had been raising sand with -- because she felt she had been mistreated by the doctor. And so I, you know, informed her that I was trying to get some of the girls that were involved in this thing, you know, to try and see if we could help them get this practice stopped



in Aiken because we felt that was a violation of their civil rights.

Q. Did you undertake to do anything on her behalf? A. Yes, I called the Counsel [sic] on Human Rights office here in Columbia and asked them if they could assist us in this case to try to get somebody to represent the girls in this case, have somebody come down and talk with them. And I got, I think it was two or three of them together and they met at my office to discuss the case with Miss Smith from the Human Rights, you know, office here in Columbia. And, you know, we discussed it and found out what could be done, if anything, you know, about this and what rights they had under the law and whether or not their civil rights had [152] been violated.

Q. Did you have any conversation with Mrs. Williams thereafter? A. I talked to Mrs. Williams -- I was in contact with her, if she didn't call me I would probably call her every day there for a while. And so she said she -- they desired --

MR. KALE: Objection, Your Honor, it's hearsay.

MR. MCDONALD: Well, it's not hearsay, it goes to the prior inconsistent statements and clearly not hearsay.

THE WITNESS: Mrs. Williams told me --

MR. KALE: Well, let the Panel rule on this matter.

MR. MCCUTCHEN: The Panel is of the opinion that the evidence is proper and we will permit you to answer the question.

MR. MCDONALD: Please proceed, Mr. Allen.

THE WITNESS: I talked with Mrs. Williams and she told me she would like to talk with counsel, have them come down and discuss this matter further with her and, you know, see what could be done. And so then I contacted the office here in Columbia and also sent a letter that asked them to come down and discuss it with the clients, you know, that had been victimized by this doctor.

Q. Did you have any conversation with Edna Smith relating to Marietta Williams?

A. Yes, I talked with Edna Smith on the telephone after I called the counsel [sic] and we had conversation on the telephone maybe [153] two or three times about it, about this matter.

Q. What was the nature of those conversations? A. Well, we requested that Miss Smith to come down and meet with the

girls and discuss with them -- they wanted to talk with them about what could be done. And, at that time, Miss Smith, you know, she came down later and talked with them.

Q. Did you specifically discuss Marietta Williams in those conversations with Miss Smith? A. Well, Marietta Williams was one of the girls that -- there were two other girls also in this; Mrs. Dorothy Waters and Mrs. Virgil Walker was also the other two girls that was part of this. Well, the part of this action was taken against him. And so they also wanted to talk to Miss Smith about what could be done about it.

Q. Did you indicate to Miss Smith that Marietta Williams wished to secure representation in this? A. Yes, I did.

Q. Was this following that first meeting in your office? A. It was following the meeting in the office.

Q. Well, all right. Thank you sir. Answer any questions, if you will, that Mr. Kale may have.

CROSS EXAMINATION:

QUESTIONS BY MR. KALE:

Q. Mr. Allen, I didn't catch that first organization, not the [154] United

Christian Workers but the other organization. A. South Carolina Association for Improved Justice.

Q. And you say the purpose of that is to improve the criminal system of justice in South Carolina? A. Yes, to try to -- we deals with mostly the criminal system of justice where the people are being tried in court to try to see they get proper representation. And someone is in jail we try to help get them out and get a bond or get the judge to release them on self recognizance.

Q. Let me ask you this: Have you even been convicted of a crime? A. Yes, I have.

Q. What crime was that? A. That was concerning my business that I was in.

Q. Do you know what the crime was? A. It was conspiracy, I believe, and forgery.

Q. Did you serve a jail sentence for that crime? A. Yes, I did.

MR. KALE: I have no further questions.  
EXAMINATION BY MR. CRUM:

Q. Mr. Allen, what is the source of your livelihood? A. I'm a new and used car dealer.

Q. I believe you testified earlier that Mrs. Williams told you that she didn't want to bring an action against the doctor.

[155]\* A. I said she did.

Q. Well, didn't you testify to that?

A. Yes, I did.

Q. Was anybody else in your presence or within hearing when she made that statement to you? A. Well, that was around to her house and I believe her grandmother was there at that time.

Q. But there was no one else to corroborate that statement? A. Well, now, we discussed this at the meeting that day. It was three; Mrs. Dorothy Waters and Mrs. Shirley Brown, I believe is all at that meeting that day at my office.

Q. I thought this was after that, I gathered this was after that initial meeting that she told you that. A. This was after the meeting she said, you know, wanted to talk --

Q. And I believe you told me you contacted her several times. A. I talked with her. She called me some and I called her.

Q. But there is no other witness that can confirm this statement? A. Well, her mother was there. I don't know Mrs. Dorothy

\* This is the first of two pages numbered "155."

Waters was there at the time, not to her house, no. But we talked about this on several occasions, about getting somebody to represent the girls.

Q. Just the two of you talked about it, there was no third party? A. Well, all of us talked about it. [155]\*

Q. Well, now, who is all of us?

A. Well, I mean, Mrs. Williams, and I believe her grandmother was there, and they came by my office one time also, and my secretary was there.

Q. Did she hear the conversation?

A. Yes, she heard it.

MR. CRUM: I have no further questions.  
EXAMINATION BY MR. MCCUTCHEN:

Q. Do you have any idea how many times you had talked to Mrs. Williams before this meeting with Miss Smith and the others in your office?

A. I don't know. Well, when the thing first blew up Mrs. Brown -- this thing came out in the paper, you know, about this lady, and her husband was in jail, had been, you know, sterilized. This started the ball to rolling. So then people in the community began communicating about what was going on around Aiken and what

\*See note previous page.



could be done about it. So this is when we called a meeting, and our organization also met to discuss this and decided what, you know, we should do to try to correct this problem.

Q. Well, my question was directed to Mrs. Williams. A. How many times?

Q. How many times did you talk to Mrs. Williams before this meeting? A. I would say -- you mean Miss Edna?

Q. Yes. [156] A. I would say at least on two or three occasions I talked to her. She called me a time or two I know. I called her house and she came out to my office. And I also went by her house to talk with her. This was a kind of touchy situation for me to get into it being a man, when a lady has had this thing done to her it's a touchy situation so I just couldn't barge in, you know. So I tried to, you know, go at it kinda easy and see what I could do to help the girls.

Q. Well, did she call you first or did you approach her first? A. I approached her.

Q. Was the litigation discussed when you first met in your office, about the type of lawsuit that could be brought? A. The type of lawsuit to be brought?

Q. Yes, when you had the meeting at your office? A. We didn't go into the lawsuit too much on the first occasion because that was just to kinda advise the girls of their rights and sit down and discuss the matter.

Q. Well, were they advised, at that time, that they could bring these suits? A. They were advised that they had a right to if they so desired.

Q. To bring the lawsuit? A. Well, I mean, take some action, you know, against the doctor.

[157] Q. Well, you are talking about legal action, that they had a right to bring legal action, is that what you are telling me? A. Well, now, I had already advised them that because they had a right -- I felt they had a right to legal action.

Q. This was discussed again when you met with Miss Smith and the others at your office? A. Well, we mostly talked about -- we were trying to get together how many people was involved and kinda get ahold of the thing. And then later we decided that we would contact the office again for representation for the lawyer to come down and discuss this matter with the girls and advise

them of all their rights and what could be down because of the fact we felt their rights had been violated by this doctor.

MR. MCCUTCHEN: That's all I have.

EXAMINATION BY MR. CRUM:

Q. Did you discuss with Mrs. Williams whether or not she felt her rights had been violated by the doctor? A. Beg your pardon?

Q. Did you discuss with Mrs. Williams whether or not she was of the opinion that her rights had been violated by the doctor?

A. Yes, I did, I discussed it with her.

Q. What was her opinion as to her rights? A. Well, Mrs. Williams, she was somewhat upset about it and she felt like she wasn't treated right. And so I told her [158] I didn't think it was right either.

MR. CRUM: No other questions.

MR. KALE: I would like to just ask one more question, if I may.

RE CROSS EXAMINATION:

QUESTIONS BY MR. KALE:

Q. Mr. Allen, do you know if Marietta Williams has anything against Miss Smith, any personal grudge or other animosity? A. Not that I know of.

Q. She would have no reason to

hurt Miss Smith that you know of? A. I don't know. Let me say this: Marietta Williams, to my opinion, is --

Q. Well, no, answer the question --

MR. MCDONALD: He has asked the question and he doesn't want to hear the answer.

MR. KALE: Well, he is not being responsive to my question.

MR. MCDONALD: He doesn't want to hear the answer but he has got a right to respond to it.

MR. KALE: He doesn't have a right to respond to something I didn't ask him.

MR. MCDONALD: Well, let him respond to it. How do you know? Let him finish.

MR. KALE: I asked the question, "Do you know" --

MR. MCDONALD: I think he is entitled to answer [159] the question --

MR. KALE: I'm going to repeat --

MR. MCDONALD: I would like a ruling from the Panel.

MR. MCCUTCHEN: Well, repeat your question.

Q. (By Mr. Kale) Do you know if Marietta Williams has any dislike for Miss Smith? A. Not that I know of personally.

Q. Okay.

MR. MCDONALD: All right, sir, now, would you explain your answer. [Y]ou were going to explain that answer.

THE WITNESS: What I was about to say, as I stated, Marietta Williams was upset, you know, she is here a while and she is there a while. And she seemed to be a little bit disturbed and she was very upset about this thing. When you talked to her today she is one way and tomorrow you talk with her and she is another way. And so it just -- I think she is mentally disturbed.

MR. KALE: Objection, Your Honor, I don't think that's something he can testify to.

MR. MCDONALD: Now, with all respect, he asked him what he thought about motivation, and the witness is trying to explain it. Now, I know he doesn't want this --

MR. KALE: No, I didn't ask him that at all.

MR. MCDONALD: -- want to hear this --  
[160]

MR. KALE: I didn't ask him any question about --

MR. MCDONALD: -- and I think the witness is entitled to explain it.

MR. MCCUTCHEN: I think the witness has pretty well said that she was one way one day and one way the next. It seems to me that that's sufficient. I think the Panel understands.

MR. KALE: My objection was to his classification that she was emotionally disturbed. I don't think he is competent to make such a determination.

MR. MCDONALD: Are you familiar with her reputation in the community, Mr. Allen?

MR. KALE: Objection, Your Honor.

THE WITNESS: Yes, --

MR. MCCUTCHEN: No, I don't think --

MR. KALE: I'm objecting to this.

MR. MCCUTCHEN: -- the reputation of Mrs. Williams really has any --

MR. MCDONALD: Your Honor, I want to ask him about reputation for stability, that's the real question that I want to ask him.

MR. KALE: What does that go to? I don't see the relevancy.

MR. MCDONALD: All right, sir, let me just make an offer, if I may, that this witness would testify --

[161] MR. MCCUTCHEN: Well, let the record show that the Panel doesn't think



this question is proper. Put into the record your offer of proof.

MR. MCDONALD: Yes, sir. That this witness would testify that Mrs. Williams has a reputation of being unstable in the community, and that she is changeable and subjective and take one position, as he said, one day and another position the next. That's all I have. If the Panel has nothing further.

MR. MCCUTCHEN: We have nothing else.

(Thereupon the witness was excused)

MR. MCDONALD: We have some documentary evidence that we would like to introduce. We have no further testimony. We would like to introduce into evidence a deposition of Eldon D. Wedlock taken in litigation, Doe v. Pierce, Civil Action Number 74-475. And the letter of August 30, 1973, attached as an exhibit to this Affidavit. And that will show that it was in the hands of an attorney associated with the Attorney General's office as of April 29, 1974.

MR. KALE: Your Honor, I would object, I don't see what the relevancy of what Mr. Wedlock's deposition is with this particular proceeding.

MR. MCDONALD: Well, it goes to our whole question of initiation of the Complaint and the forwarding of the [162] letter. You see, our position is the letter was in existence more than a year prior to the filing -- institution of these proceedings. And we believe that there was an ethical violation --

MR. KALE: In whose hands?

MR. MCDONALD: In attorneys for the Defendant in Doe v. Pierce.

MR. KALE: Which Attorney, specifically, are you referring to?

MR. MCDONALD: Well, the witness testified that Mr. Johnson received a copy of the letter. This deposition would show that attorneys in the office of the Attorney General of this state had in their possession the letter as early as April 29, 1974. We previously requested, by letter to Mr. Williams, to inform us of the date of the transmittal of this August letter to this committee. We believe -- [a]nd alleged upon information and belief that it was some five months following this deposition.

MR. CRUM: Where was that allegation made? I don't see it in the record of this case.

MR. MCDONALD: I believe, in our answer, Your Honor, we set up as a defense that the proceedings were not instituted in good faith but retaliation [sic] for bringing this lawsuit. And a part of our proof would be that the letter existed for a year before anybody did anything about it.

[163] MR. MCCUTCHEN: What proceeding are you talking about that was not instituted in good faith?

MR. MCDONALD: By that I mean not what this Board did but that the sending of the letter was not in good faith. And I just simply want to show that people -- that the letter was in existence for a year or so, and the attorneys had knowledge thereof, and they only forwarded it to the Board; number one, after the Doe v. Pierce lawsuit was filed and after Judge Blatt ruled in that case there had been no impropriety in connection with the bringing of Doe v. Pierce based upon allegations --

MR. KALE: Your Honor --

MR. MCDONALD: We also want to point out to the Panel that Judge Blatt's ruling was withheld, as I understand, upon information and belief, from the Committee on Grievances and Discipline. And we contend

that that was clearly helpful material to the Respondents. And that had Judge Blatt's ruling [sic] been available in Doe v. Pierce the Complaint possibly would not have been filed. But in that connection I would like to introduce the deposition of Mr. Wedlock and also the deposition of Mary Roe which contains the ruling of Judge Blatt. And finally we did correspond with the Secretary of the Committee on Grievances and Discipline and requested him to tell us when the August 30 letter, which forms the basis for this complaint, [164] was forwarded to the Board and the name of the individual who forwarded it. And that information has not been provided to us and I would renew that request at this time so that the record can be clear in that regard.

MR. KALE: Does counsel contend that there is a statute of limitations on ethical violations?

MR. MCDONALD: No. There are the cases that hold that the weight -- well, we argue the matter in our brief. I think it goes to two things really. When the evidence is procured from a party who has an adverse interest in other litigation then it's not entitled to the same weight before the disciplinary committee. It also shows that

the letter was forwarded to the committee not because of any concern with an ethical violation but to take advantage of something to retaliante [sic] against the Respondent. We cited the cases in our brief; the Linsky Case, for example involved a net worth tax prosecution, and the clear language there is you can't seize upon even unlawful conduct to punish somebody or retaliante [sic] against them for behavior that's basically not related to the unlawful act. And these documents are evidence of that proposition if you accept the Respondent's position.

MR. KALE: May it please the Board, this matter was brought up in Federal Court before Judge Chapman and Judge Chapman ruled on all of these matters which counsel [165] has now presented here. I would like to put into evidence his Order dismissing the complaint. He found that Judge Blatt did not have the issue of solicitation before him, that at most it was -- well, let me just read what he has in his Order. May I read this to the Panel?

MR. MCCUTCHEN: Go ahead.

MR. KALE: "This Court cannot follow the plaintiffs' contention that Judge Blatt in his comments quoted above from Doe v. Pierce, decided the issue of solicitation

in such a manner that it has become res judicata or acts as a collateral estoppel binding upon either the Board or the Supreme Court of South Carolina.

The receipient [sic] of the letter from Koe was not a party to the case. Plaintiff Koe did not represent any party in that action and was not directly involved therein. There is no indication that she was questioned by the attorneys or by Judge Blatt. Certainly the Judge was not conducting a hearing as to possible disciplinary actions at the time he made his statement, which makes it clear that he was allowing questions as to solicitation, solely because it might go to the issue of the validity or appropriateness of the class action.

A United States District Judge sitting alone could not bind the South Carolina Supreme Court on what disciplinary inquiry it might make into the affairs of an attorney [166] admitted to practice in South Carolina by the South Carolina Supreme Court, and subject to the Canons of Ethics adopted by that Court. This is particularly true where the issue of solicitation is raised collaterally to the matter before the



Federal Judge." Then he cites *Ginger v. Circuit Court for County of Wayne*. And I will admit this into evidence so you can read it, the full amount. I will not quote the case citation.

Then he goes on: "The complaint alleges in paragraph 14" --

MR. MCDONALD: What page are you reading from, Mr. Kale?

MR. KALE: Eight. "The complaint alleges in paragraph 14: "The Board has no authority to supervise or discipline the conduct of attorneys in their practice before the courts of the United States." While it's possible, but rather unlikely, an attorney could practice before the federal courts after being disciplined, suspended or disbarred by the State Supreme Court. However, this does not mean an attorney's actions in obtaining, preparing or presenting cases in the federal court are exempt from the State Canons of Ethics, and such actions are not shielded from the scrutiny, concern and control of the State Supreme Court, which has the responsibility for maintaining the high standards of the legal profession and the integrity [167] of the Bar." That's just an exerpt from

his Order but it covers these matters as far as statements that were made in the deposition by Judge Blatt which he has offered. We do not, again, feel that they are permissible here, they are certainly not of any evidentiary value. What other matters did you submit besides his deposition?

MR. MCDONALD: I submitted two depositions, the deposition of Eldon Wedlock and the deposition of one of the Plaintiffs contained in the ruling of Judge Blatt.

MR. KALE: As far as the deposition of Mr. Wedlock, I don't know what purpose he is offering that but obviously it's not relevant to this particular proceeding. I would like to admit this into evidence.

MR. MCDONALD: We have no objection.

MR. MCCUTCHEN: The Panel will accept the documents that you have offered for whatever they might be worth, the two depositions and the copy of Judge Blatt's, subject to Mr. Kale's objection.

MR. MCDONALD: Well, let's see, one of those depositions makes reference to Plaintiffs by name. And, of course, that was a John Doe proceeding -- or a Jane Doe proceeding -- I'm sorry -- to preserve the

anonymity [sic] to the extent that that's possible, the Plaintiffs. Could I request permission to mark through the names as they appear?

MR. MCCUTCHEN: Sure.

[168] MR. MCDONALD: I would just simply point out to the court that --

MR. CRUM: Let me ask you a question, please. Is it your position that the source from which evidence is procured upon which a complaint may be issued in a grievance proceeding is governed by the manner in which notice of that complaint is received?

MR. MCDONALD: Well, the timing is crucial, I think, Mr. Crum.

MR. CRUM: You mean, timing has something to do with whether or not there is a violation of professional ethics?

MR. MCDONALD: It was not apparently regarded by -- I think the inference is strong that it was not regarded as a violation until the lawsuit was filed. So that the furnishing of that letter to the Board suggests that concern was not for the violation but retaliating [sic] against the individual who had some involvement in that litigation. Plus there is other

evidence too, Mr. Crum, to show that there was evidence that was withheld from the Board. That is Judge Blatt's ruling which, I think, is an obligation on the state to make everything available. I don't think the prosecution, for example can withhold any, I think that's clear -- Brady v. Maryland -- you can't withhold exculpatory evidence, and I think that clearly happened [169] here. Also, it's apparent -- we requested that the exact transmittal date be given to us but it appears that not only was the letter not forwarded to the Board until after a lawsuit was filed but not until after Judge Blatt ruled that it had no -- that it furnished no basis for a defense in that lawsuit. So I think it's the combination of occurrences strongly suggest that there was a retaliatory [sic] element involved.

MR. KALE: I feel it's necessary for me to make some reply to this statement. First of all his characterization of Judge Blatt's ruling, as I said, in this particular order of Judge Chapman it was no ruling involved as far as solicitation. As a matter of fact, from talking with the attorneys involved Judge Blatt made the

statement that this was particularly a matter for the South Carolina Bar and not a matter for him. Now, I was not present and I cannot say that of my own knowledge. But since he has made an offer of proof which he hasn't substantiated by any testimony I would offer this for the Panel's consideration because I feel like he has impinged upon the integrity of my office. And furthermore, he has made no statement as to when these matters were forwarded over or when they had knowledge -- knowledge came to our particular office. I think that he is dealing in speculation and events that he has no personal knowledge of. And we would ask the Board not to consider [170] these statements.

MR. MCDONALD: No, sir, not the Board; that the letter. When I used the word initiated I mean the letter was sent, that's what I mean by initiated. I've asked -- we know certain facts and Mr. Kale shouldn't say that I'm making representations not supported -- Marietta Williams testified that she made the letter available to Mr. Johnson when she went to see him which was in August, September, at the latest, 1973, showed him the letter. All right, we know

that the letter came to the attention of the Attorneys in the Attorney General's office at least as of the date of the deposition of Mr. Wedlock because it's read into the record and attached to that deposition on April 29, 1974. Now, I don't know when the letter was sent to you gentlemen but I have requested Mr. Williams to tell me. Of course, you know we are alleging --

MR. MCKEOWN: I don't personally know, the members of the Panel do not know.

MR. MCDONALD: Well, Mr. Williams, I assume, would know. We are alleging, I believe, upon information and belief. Of course, I don't have -- and I requested that I be furnished that data. And I think the Board, the Panel would be interested.

MR. MCCUTCHEN: Mr. McDonald, is there any question in your mind that the handling of this particular proceeding [171] insofar as the Board of Commissioners on Grievances and Discipline is in anywise irregular?

MR. MCDONALD: No, sir, we make no such allegation. In point of fact, we surmised that had this Board been fully apprised of Judge Blatt's ruling that the complaint would never have issued. Judge



Blatt did make a ruling which is for the members of this Panel to determine what he said. And Judge Chapman made a ruling and it's for the members of this Panel to determine what he said. But as I read this Order he dismissed it on the undergrounds on the theory that he simply was not going to interfere. And he talked about the bad faith and he said, well, they have got to show more than that, they have got to show other things. I don't think it's as positive, Mr. Kale does, but that's a decision for you gentlemen. And I wanted to put the documents before you and have endeavored to do so.

MR. KALE: I might say that Mr. Johnson -- I can't speak for Mr. Johnson, Mr. Johnson has no connection with my office whatsoever. And what actions he takes or does not take are strictly Mr. Johnson's actions. As far as Judge Blatt's statement again we disagree on what the interpretation of those provisions are, but I would merely say that this matter was considered by Judge Chapman and even if, which Judge Chapman found that he did not, even if Judge Blatt had ruled, Judge Chapman's decision makes it clear that that [172] is

not binding on this Board or the South Carolina Supreme Court.

MR. MCCUTCHEN: Well, I think we have indicated that we would permit to put the records in that you have identified for whatever they might be worth.

MR. MCKEOWN: We would just ask that the Reporter mark them and put them in the record.

MR. MCDONALD: Can I take a black pencil and strike out the names?

MR. MCCUTCHEN: Sure.

MR. MCDONALD: I don't know how we ought to -- Well, let me just say that we renew the request that we be furnished with the information showing the date of the transmittal of the letter and the identity of the individual be made available --

MR. MCCUTCHEN: Well, this Court has no information on that at all. We are simply given the complaint and the answer and we are told to hear it. We have no other material at all. And your motion is in the record.

MR. MCDONALD: All right, sir.

MR. CRUM: If you had wanted that couldn't you have made a motion?

MR. MCDONALD: Well, I wrote a letter.

Let me introduce it.

MR. CRUM: Couldn't you have made a motion that [173] would have some binding about it rather than this? A motion to produce would have done it, wouldn't it?

MR. MCDONALD: Well, I wrote a formal letter and I intended for that to have that effect. Let me introduce that letter into evidence, if I may, so there won't be any question about that. I apparently don't have a copy of my letter but it would be in the possession of Mr. Williams. And I think that's clearly part of the record for this Panel, and I request that this Panel take notice of that letter. That concludes the Respondent's case. We would renew our motion for dismissal of the complaint.

MR. MCCUTCHEN: At this point we will take your motion under advisement along with the balance of the record. Is there anything else from the Attorney General?

MR. KALE: No, Your Honor. We have requested a right to respond to their pre-hearing memorandum.

MR. MCCUTCHEN: I understand that, you made it earlier. If they have any reply you will have the opportunity to reply.

MR. MCDONALD: All right, sir.

(Thereupon Complainant's Exhibit C-3, Respondent;s [sic] Exhibits R-2 and R-3, marked in evidence)

(4:10 o'clock P.M)

CERTIFIED TRUE AND CORRECT:

s/ Joseph D. Smith  
JOSEPH D. SMITH, Notary Public

## EXHIBIT C-3

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

American Civil Liberties Union)  
and Jane Koe,

Plaintiffs,

vs.

O. Harry Bozardt, Jr., H.  
Hayne Crum, Joseph O. Rogers,  
Jr., Marion H. Kinon, Edward  
M. Royall, II, George F. Cole-  
man, Robert A. Hammett, Thomas  
J. Thompson, Coming B. Gibbs,  
Jr., Lowell W. Ross, Frank E.  
Harrison, J. Malcolm McLendon,  
C. Thomas Wyche, William L.  
Bethea, John B. McCutcheon,  
Melvin B. McKeown, Jr. indivi-  
dually and as members of the  
Board of Commissioners on  
Grievances and Discipline, and  
their successors; and the  
Attorney General of South  
Carolina,

Defendants. )

[Filed Dec.  
12, 1974]

) Civil  
) Action  
) No.  
) 74-1703

) O R D E R

This action is brought by American Civil Liberties Union, hereinafter referred to as ACLU, and Jane Koe, hereinafter referred to as Koe, who is a practicing attorney in Richland County, South Carolina, and is using the fictitious name of Jane Koe to protect her privacy and

professional reputation. The plaintiffs ask this Court to enjoin the Attorney General of South Carolina and the members of the Board of Commissioners on Grievances and Discipline, hereafter referred to as Board, who are appointed and elected pursuant to the Rule for Disciplinary Procedure of the South Carolina Supreme Court. The complaint also seeks costs, plus attorneys' fees and a declaration by the Court that the pending complaint against Koe before the Board is in violation of her rights under the First and Fourteenth Amendments to the Constitution of the United States.

The defendants have moved to dismiss the action on five separate grounds, but since the dismissal will be granted, it is necessary to discuss only the grounds supporting dismissal.

On October 10, 1974, Koe received a notice and a complaint from the secretary of the Board, which complaint alleges on information and belief that Koe committed an act of misconduct as an attorney by writing a letter dated August 30, 1973, to an individual in Aiken, South Carolina, which the secretary of the Board considered to be a solicitation in violation of the



Canons of Ethics. The complaint prays "that the Board of Commissioners on Grievances and Discipline consider these allegations and make such disposition as may be appropriate."

Koe contends that since she is associated with the ACLU as a cooperating attorney, is an officer of the South Carolina affiliate of the ACLU and serves in both capacities without fee or pay or any expectation thereof and since she had no financial interest or expectation of gain or reward in connection with the correspondence or any representation that may have been produced thereby, she is not guilty of violating any of the Canons of Ethics and the action of the Board amounts to harassment, was taken in bad faith and for the purposes of chilling and discouraging the activities of the ACLU and the giving of solicited and unsolicited advice to lay persons that they should obtain legal counsel or take legal action, when their rights are being violated or threatened with violation.

The complaint alleges in part:

"7. Prior to August 30, 1973, plaintiff Koe was contacted by a Mr. Gary Allen, of whom she had prior knowledge and knew to be

acting on behalf of a Mrs. M.W. with apparent and actual authority to so act. He requested that plaintiff Koe or the ACLU undertake to represent Mrs. M.W. in an action against certain persons who procured, performed, or authorized her sterilization. In response to such request, she wrote Mrs. M.W. on August 30, 1973, stating the willingness of the ACLU to undertake to secure her representation.

8. Plaintiff Koe talked thereafter with Mrs. M.W. on several occasions about her proposed law suit. However, Mrs. M.W. elected not to proceed with litigation and plaintiff Koe's involvement with her was terminated. Other women residing in Aiken, South Carolina, however, who had been sterilized or threatened with sterilization, elected to proceed with litigation and filed a damage action through lawyers associated with the ACLU, in Doe v. Pierce, Civ. No. 74-475, D.S.C. Plaintiff Koe does not represent any of the parties in Doe v. Pierce, nor has she any direct involvement in that case.

9. Upon information and belief, attorneys representing some of the defendants in Doe v. Pierce secured a copy of the August 30, 1973, letter from plaintiff Koe to Mrs. M.W. and attempted to raise as a defense in that suit that the action was barred or rendered unlawful because of solicitation. On September 24, 1974,

during the deposing of one of the plaintiffs in Doe v. Pierce, Honorable Sol Blatt, Jr., who had knowledge of the August 30, 1973, letter, permitted certain questions to be propounded to that witness involving her contacts with plaintiff Koe, but solely as to the issue of the appropriateness of the suit as a class action. The court ruled that plaintiff Koe had not committed solicitation as follows: Judge Blatt: All right, now let the record show that the other question presented to the Court was the question pertaining to this witness as to how she came to meet or to know [Jane Koe] and so this record will be clear and recognize that the Court may clear it some that this question probably goes to the issue of solicitation. This Court feels in its posture of the American Civil Liberties Union has a duty and an obligation under the manner in which it operates to seek out and help those who it feels are not able to help themselves, either their lack of knowledge or lack of funds, the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACLU, in contacting if that in fact did happen, the plaintiffs but the Court feels that the issue of contact or solicitation does go to the question of validity or the appropriateness of a class action. Because of that and only because of that this Court feels that it is an appropriate question to ask this plaintiff."

Plaintiffs allege that the above mentioned "ruling" of Judge Blatt involving the alleged solicitation by plaintiff Koe was withheld from the Board by the Attorney General of South Carolina or his attorneys at the time the complaint was initiated.

The letter from plaintiff Koe to Mrs. M.W. contained the following paragraph:

"You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on."

The Board contends that this paragraph constitutes a solicitation in violation of the Canons of Ethics. This is the charge Koe is called upon to answer before the Board.

The above letter was dated August 30, 1973. The letterhead showed "Carolina Community Law Firm" with a Columbia address. The names of four attorneys were listed on the letterhead and Koe signed the letter



as "Attorney-at-Law". Although the above quoted paragraph mentions ACLU, there is no indication in the letter that Koe is acting on behalf of the ACLU, is an officer, employee, cooperating attorney or in any way connected with ACLU.

The Supreme Court of South Carolina has adopted a "Rule on Disciplinary Procedure" pursuant to its authority to discipline, suspend and disbar attorneys at law. The South Carolina Constitution, Article V, Section 4 and South Carolina Code of Laws (1962) §56-96.

The defendants, except the Attorney General of South Carolina, are the duly appointed and acting members of the Board of Commissioners on Grievances and Discipline appointed by the South Carolina Supreme Court for the purpose of investigating and making recommendations to the Court in disciplinary actions as provided by the aforementioned rule. The duties and responsibilities of the Board have been expressed by the Court in Burns v. Clayton, 237 S.C. 316, 177 SE 2d 300 (1960) as follows:

"... The Board of Commissioners on Grievances and Discipline are officers of this Court, commissioned

and charged with the duty of investigating alleged misconduct on the part of their fellow members at the Bar of this State and of reporting to this Court the proceedings of their inquiry, and their findings and recommendations .... The Board's report is advisory only, this Court being in no wise bound to accept its recommendation; and upon this Court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate and disciplinary action thereabout."

The Rule on Disciplinary Procedure provides that unless a complaint filed with the Board does not on its face state facts sufficient to charge misconduct, the secretary of the Board shall cause a copy of the complaint together with a notice to be mailed to the attorney charged. The attorney then has 20 days within which to file an answer to the complaint. After filing of the answer a formal hearing is held upon reasonable notice to the complainant and the attorney before a panel of three commissioners appointed by the chairman of the Board. No member of the panel may be a resident of the judicial circuit in which the complaint originated



or the judicial circuit in which the respondent resides. The rules also provide the chairman of the Board may request the Attorney General's office to handle prosecution of a claim before the hearing panel.

The attorney charged in the complaint has the right to appear, be represented by an attorney of his choosing, present witnesses and evidence, testify himself, cross examine the complaint and complainant witnesses and due process is observed.

If the panel finds the attorney guilty of misconduct warranting only private reprimand, the panel administers such reprimand. However, if the panel finds misconduct meriting public reprimand, indefinite suspension or permanent disbarment, the recommendation goes to the full Board which shall hear the matter after due notice to the parties and the submission of briefs and the presentation of oral argument in opposition to the recommendations of the panel. If the Board concurs in the finding of misconduct and the administering of discipline of more than private reprimand, the matter is then referred to the Supreme Court of South Carolina and the respondent attorney is again given the opportunity to

be heard. Until the proceedings are filed in the Supreme Court they are private, not open to the press or the public, unless the respondent requests in writing that they be made public.

Subsequent to receiving the notice and complaint from the Board, Koe and the ACLU filed the present action to enjoin the proceedings, and no further steps have been taken by the Board awaiting the disposition of the motion to dismiss the present suit.

In opposition to the defendant's motion to dismiss, plaintiffs have filed a 35 page brief, citing 154 different decisions, together with 13 pages of attachments to the brief. For all of this effort, plaintiffs do not distinguish their suit from the holding of the Second Circuit in Erdmann v. Stevens, 458 F.2d 1205 (1972). Little or no effort was made by the plaintiff to advise this Court of why it should not apply Erdmann, and no suggestions have been made as to how this Court can ignore it. The Erdmann case is so similar in applicable law and its reasoning is so sound and persuasive, that it answers every question or position raised by the plaintiff, except the rather weak argument of res judicata and collateral estoppel.

Erdmann was an attorney practicing in New York and brought his suit to enjoin the conduct of disciplinary proceedings against him by members of the Appellate Division, First Department, of the State of New York. The disciplinary proceedings arose out of remarks made by the attorney in a magazine article highly critical of the judges of the New York courts. He asserted that the purpose of the disciplinary proceeding was to discourage and prevent his exercise of his first amendment rights and that the same violated his rights to equal protection and due process. These are the basic claims of Koe and the ACLU in the present action.

Erdmann attempted to enjoin the judges of the court after they had refused to accept the recommendation of the Committee on Grievances of the Association of the Bar of the City of New York. The present plaintiffs attempt to enjoin the proceedings even before they are heard by the Board. In refusing the injunction and dismissing the action the Second Circuit wisely applied Younger v. Harris, 401 U.S. 37 (1971), and this Court must do the same.

It is rare to find a decision of another court which is so helpful.

After finding it had jurisdiction in the action, the Erdmann court stated at page 1208:

"The principal issue is whether, in view of the policy expressed by the Supreme Court recently in the sextet of cases headed by Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (1971), (footnote with names of other five cases omitted) Erdmann's complaint and supporting papers state facts entitling him to injunctive relief. In Younger the Supreme Court denied federal injunctive relief against a pending state criminal prosecution and held that because of the strong policy in favor of 'the notice [sic, notion] of "comity," that is a proper respect for state functions' and the Constitution's creation of a system in which the sensitivity of both state and federal courts must be recognized and balance[d], such intervention should be permitted only under extraordinary circumstances, such as where the state proceedings have been instituted or prosecuted in bad faith or as part of a campaign of harassment which, unless restrained, would cause grave and irreparable injury without providing any reasonable prospect that the state court would respect and satisfactorily resolve the constitutional issues raised. See, e.g. Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 (1965). In thus reaffirming the long-established policy against



federal intervention, see Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951); Cleary v. Bolger, 371 U.S. 392, 83 S.Ct. 385, 9 L.Ed. 2d 390 (1963), it was recognized that unless intervention were severely restricted, alert counsel would resort to federal relief as a readily available means of disrupting or subverting legitimate state prosecutions [sic] in which constitutional issues could be resolved by competent state trial and appellate tribunals."

Although Koe alleges bad faith and harassment in the complaint, this is not sufficient, since under Younger, she must also show that unless restrained the proceedings "would cause grave and irreparable injury without providing any reasonable prospect that the state court would respect and satisfactorily resolve the constitutional issues raised." In discussing irreparable damage at page 1210, Erdmann states:

"The Appellate Division's institution of disciplinary proceedings against him admittedly represents the exercise of a function exclusively vested in it and falls far short of the Dombroski-type [sic] campaign of harassment and 'official lawlessness' described by the Supreme Court in Younger as the kind of exceptional or extraordinary circumstances warranting

federal intervention. Furthermore, there is an absence of any evidence of irreparable injury of the type warranting relief under Younger, which requires proof of injury substantially in excess of that normally considered sufficient to invoke equitable relief. In noting that to justify federal relief against a state prosecution the injury must be 'both great and immediate,' Justice Black there stated:

'Certain types of injury, in particular, the cost, anxiety, inconvenience of having to defend against a single criminal prosecution [sic], could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.' (citation omitted).

The injury alleged here is no more than that incidental to any single prosecution of a quasi-criminal nature. There is no reason to assume that Erdmann's constitutional rights will not be protected by the Appellate Division, Third Department, to which the disciplinary [sic] proceedings against him have been transferred for adjudication, or, if further review becomes necessary, by the New York Court of Appeals. The competency



of New York state courts to decide questions arising under the federal Constitution, by which we are all governed, is beyond question. In the unlikely event that both of these state appellate courts apply improper standards, Erdmann could seek Supreme Court review by petition for writ of certiorari. Undoubtedly because of general recognition of the advisability of permitting state courts first to act with respect to the delicate relationship between themselves and their officers, the traditional method of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings has been by way of the state appellate court route to the Supreme Court rather than by direct federal intervention at the initial stages. See, e.g., Schwabe v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 2d 796 (1957); Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); Spevack v. Klein, *supra*; Matter of Willner v. Committee of Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963)."

This Court cannot follow the plaintiffs' contention that Judge Blatt in his comments quoted above from Doe v. Pierce, decided the issue of solicitation in such a manner that it has become res judicata or acts as a collateral estoppel binding

upon either the Board or the Supreme Court of South Carolina.

The receipient [sic] of the letter from Koe was not a party to that case. Plaintiff Koe did not represent any party that action and was not directly involved therein. There is no indication that she was questioned by the attorneys or by Judge Blatt. Certainly the Judge was not conducting a hearing as to possible disciplinary actions at the time he made his statement, which makes it clear that he was allowing questions as to solicitation, solely because it might go to the issue of the validity or appropriateness of the class action.

A United States District Judge sitting alone could not bind the South Carolina Supreme Court on what disciplinary inquiry it might make into the affairs of an attorney admitted to practice in South Carolina by the South Carolina Supreme Court, and subject to the Canons of Ethics adopted by that court. This is particularly true where the issue of solicitation is raised collaterally to the matter before the Federal Judge. See Ginger v. Circuit Court for County of Wayne, 372 F.2d 621 (6th Cir. 1967), at page 625:

"A Federal District Court has no original jurisdiction of a proceeding disbaring an attorney

from practice in state courts, though in the state court proceeding the attorney may raise questions based upon his rights under the federal Constitution for eventual review by the United States Supreme Court under its certiorari jurisdiction."

The complaint alleges in paragraph 14:

"The Board has no authority to supervise or discipline the conduct of attorneys in their practice before the courts of the United States." While it is possible, but rather unlikely, an attorney could practice before the federal courts after being disciplined, suspended or disbarred by the State Supreme Court. However, this does not mean an attorney's actions in obtaining, preparing or presenting cases in the federal court are exempt from the State Canons of Ethics, and such actions are not shielded from the scrutiny, concern and control of the State Supreme Court, which has the responsibility for maintaining the high standards of the legal profession and the integrity of the Bar.

The relationship between the Court and attorneys admitted to practice before it is summarized by Justice Frankfurter in Theard v. United States, 354 U.S. 278 (1957):

"The two judicial systems of courts, the state judiciatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals.

"Membership in the bar is a privilege burdened with conditions" (Matter of Rouss 221 N.Y. 81, 84, 116 N.E. 782, 783). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

Koe was originally admitted to the practice of law by the Supreme Court of South Carolina, and as a practicing attorney she must maintain the high standards of the profession she has chosen. This United States District Court will not now interfere with the investigation by the Board, an arm of that Supreme Court, as it determines whether Koe has conducted her

professional affairs in keeping with the Canons of Ethics.

Since the complaint fails to state facts entitling plaintiffs to federal intervention, the same must be and is hereby dismissed.

AND IT IS SO ORDERED.

s/ Robert F. Chapman  
ROBERT F. CHAPMAN  
UNITED STATES DISTRICT JUDGE

December 23rd, 1974

Florence, South Carolina

EXHIBIT R-1

[Bracketed materials are handwritten notations by affiant.]

STATE OF SOUTH CAROLINA  
COUNTY OF AIKEN

AFFIDAVIT

Personally appeared before me the below signed Marietta [M.E.W. Mary Etta] Williams who on oath deposes and says that:

- 1) She is black, female and is over the age of 21 years. She resides at 147 Kershaw Street, Aiken, South Carolina.
- 2) Her last child [M.E.W. Eugene Williams M.E.W.] was born on June 22, 1973, and she was sterilized thereafter by Dr. Clovis Pierce who was the attending physician.
- 3) In July, 1973, she met with a number of individuals including Edna Smith at a meeting held at the office of Mr. Gary Allen. Mr. Allen had seen her prior thereto and informed her that the meeting was for the purposes of discussing sterilizations performed by physicians in Aiken County and remedies available to women who had been sterilized, including suits for damages against the doctors involved. Desiring to learn more about her legal



rights and remedies, if any, she attended the meeting and while there met Edna Smith for the first time.

4) At that meeting or during conversations after the meeting, Edna Smith [sic] explained to her what her rights and remedies were as far as her sterilization was concerned, and informed her of her right to bring an action for injunctive relief and damages. Edna Smith did not, however, attempt to persuade or pressure her to file a law suit or offer to represent her for a fee or otherwise.

5) During July, 1973, her child was critically ill with dehydration and she had been informed by her doctor that there was danger of the baby's death.

6) Following the July, 1973, meeting at Mr. Allen's, and during the time of her child's illness, she went to Dr. Pierce's office for a regularly scheduled medical check-up. Present at Dr. Pierce's office on that occasion was attorney B. Henderson Johnson, Jr. She had not requested Mr. Johnson to be present but understood that he was present in his capacity as Dr. Pierce's attorney.

7) Mr. Johnson stated that he knew she

had had prior contact with Edna Smith and wanted to know whether or not she intended to involve herself in any litigation against Dr. Pierce concerning her sterilization. She explained that she was so concerned about the health of her child that she did not have time to worry about any law suit, whereupon she was asked by Mr. Johnson to sign a statement which he had with him at that time, disavowing any interest in any law suit involving her sterilization by Dr. Pierce. She signed the statement and showed to him a letter she had received from Edna Smith involving prior conversations they had had concerning her sterilization. At Mr. Johnson's request, she notified Edna Smith, using Dr. Pierce's telephone, that she did not wish to bring a law suit over her sterilization.

8) Mr. Johnson has, on occasions in the past, represented her in various matters.

9) This statement is freely and voluntarily given.

s/ Mary Etta Williams  
 MARIETTA [M.E.W. Mary  
 Etta] WILLIAMS

[November 7, 1974]

[Jurat omitted in printing.]

## EXHIBIT R-3

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
AIKEN DIVISION

Civil Action No. 74-475

JANE DOE and MARY ROE, on )  
their own behalf and on )  
behalf of all others simi- )  
larly situated, )

Plaintiffs, )

vs. )

CLOVIS H. PIERCE, M.D.; )  
GEORGE A. PODA, M.D., indi- )  
vidually and as Chairman of )  
the Board of Trustees of )  
Aiken County Hospital; )  
J. SAM NESBIT, individually )  
and as Administrator of )  
Aiken County Hospital; )  
RICHARD T. POORE, indivi- )  
dually and as Director of )  
the Department of Social )  
Services of Aiken County; )  
R. ARCHIE ELLIS, D.D., )  
individually and as State )  
Commissioners of the Depart- )  
ment of Social Services; )  
AIKEN COUNTY HOSPITAL, a )  
corporation; and their )  
successors in office, )

Defendants. )

Deposition of Mary Roe (Shirley Brown)  
taken before Jerlyn B. Hutto, Notary Public  
in and for the State of South Carolina, at

the United States District Court House,  
Grand Jury Room, Charleston, South Caro-  
lina, commencing at 12:00 noon on Septem-  
ber 24, 1974.

\* \* \* \*

[20]

JUDGE BLATT: Let the record show that  
the Hearing was held down in Charleston so  
that if anything developed that hadn't  
developed in the past that the Court could  
maybe assist the attorneys and wouldn't  
have to go over and over these depositions.  
The Court has been advised that the plain-  
tiff Mary Roe, her counsel has objected to  
two questions. The first question was  
what was said in conversation that took  
place in the presence of the plaintiff  
Mary Roe and three attorneys, Mr. Buhl,  
and who was the other two attorneys?

MR. LEWIS: Edna Smith and Gustau(?).

JUDGE BLATT: Gary Allen and a Miss  
Gloria Steiner from New York who is a  
magazine correspondent. The Court feels  
that the defendant ... the plaintiff's  
attorneys raised the attorney-client re-  
lationship of confidentiality because the  
attorneys were there. Having been familiar  
with the case the Court feels that possibly

the presence of Gary Allen would not waive that relationship since he had been the father confessor, that's a good word to the plaintiff's since the suit had [21] began in assisting them and helping them. So the Court feels that the presence of the reporter or magazine editor from New York, although a friend of one of the lawyers and supposedly there to assist in the investigation would destroy the confidentiality of the relationship, therefore, directs the witness to answer that particular question. I don't know who proposed the question. Of course, the record will show that you have your objection.

Q. (By Mr. Smith). Mrs. Brown, I will repeat the question. During the meeting that took place in January of 1974 at the home of your mother, what was discussed at that meeting? A. What was discussed ... we discussed sterilization. We discussed what happened at the hospital and ...

Q. Approximately how long did the meeting last? A. It last about two hours.

Q. About two hours? A. Yes.

Q. And the only topics were discussed were sterilization. A. Mostly, yeah.

Q. Was the discussion of sterilization as it affected you? A. Yes and how I felt about it.

[22] Q. Do you remember any of the particulars of the conversation? A. Any particular thing... (Nodded negatively.)

Q. Did all these people participate in the discussion? A. Yeah, they talked to me and they talked to my mamma, and asked her how she felt about it.

Q. What were your feelings at this time, Mrs. Brown? A. Well... I told them I didn't like the idea of it. I thought he was pretty darn dirty...after I had paid him part of his money and my insurance was going to pay the rest and he refused to see me after having the baby and that time the sterilization.

Q. Was the bringing of a lawsuit discussed at this time? A. They asked me did I think about it. Did I want it...to file suit against him. I told them, "Yes."

Q. Do you remember who asked you that question? A. No, I don't remember which one asked me.

Q. Did one of these people present ask you if you wanted to bring a lawsuit? A. Did they ask me?



Q. That's right. A. One of them said it. They asked me was I thinking about it and I told them yes.

JUDGE BLATT: All right, now let the record show that the other question presented to the [23] Court was the question pertaining to this witness as to how she came to meet or to know Edna Smith and so this record will be clear and recognize that the Court may clear it some that this question probably goes to the issue of solicitation. This Court feels in its posture of the American Civil Liberties Union has a duty and an obligation under the manner in which it operates to seek out and help those who it feels are not able to help themselves, either their lack of knowledge or lack of funds, the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACL, in contacting if that in fact did happen, the plaintiffs but the Court feels that the issues of contact or solicitation does go the question of validity or the appropriateness of a class action. Because of that and only because of that this Court feels that it is an appropriate question to ask this plaintiff.

Q. (By Mr. Smith). Now how did you happen to meet with Miss [24] Smith, Mrs. Brown? A. Well, I talked to Gary about it...what had happened and he asked me did I want someone to come and talk to me from the ACLU. I told him it would be okay, yes. And he sent her down.

Q. When was this? A. It was right after that...right after it happened in October or November.

Q. She came down in October or November? A. Yes.

Q. Did you meet with her with Mr. Allen? A. No, not then. Not the first visit, no.

Q. Physically where did you meet? A. At my mamma's house.

Q. She came to your mother's house? A. Yes.

Q. And at that time did you discuss the case. I want to know what you talked about. Was the case discussed at that time? A. Case....

Q. Lawsuit? A. I told her what had happened in the hospital.

Q. You did not personally contact her before she came to your house? A. No, I didn't.

[25] Q. Did you ever receive any letter from Miss Smith prior to her coming? A. On the second visit they wrote me and said that they would be down.

Q. How about prior to the first visit?

A. No.

Q. She just showed up one day? A. I talked to Gary and he said that he would send someone down to talk to me. She came down to talk to me and she called and asked the way to the house.

Q. She called prior to coming? A. Yes.

Q. And did she call soon after calling?

A. She came about the next week or the same week I think.

Q. And that was in October or November? A. Yes.

Q. Between your initial meeting with Edna Smith and the meeting in January with other people at your mother's house, did you have any reservations about bringing a lawsuit? A. Any reservations...what do you mean?

Q. Had you made up your mind? A. Yes, I talked to my mamma about it. Well, at first she told me not to do it. She didn't want any trouble. So later I talked to her and she still didn't want me to do it, I just [26] went ahead on because I didn't

like it.

Q. Thank you, 'mam, that's all the questions I've got.

\* \* \* \*

[See explanatory note, supra, A21.]  
 IN THE DISTRICT COURT OF THE UNITED STATES  
 FOR THE DISTRICT OF SOUTH CAROLINA  
 AIKEN DIVISION

JANE DOE AND MARY ROE, on	)	C/A 74-475
their own behalf and on	)	
behalf of all other simi-	)	<u>TRANSCRIPT OF</u>
larly situated,	)	
	)	<u>EXCERPTS OF</u>
Plaintiffs,	)	
	)	<u>HEARING</u>
vs.	)	
	)	
CLOVIS H. PIERCE, M.D.,	)	
et al,	)	
	)	
Defendants.	)	

At Columbia, S.C.

May 10, 1974

BEFORE:

Honorable Sol Blatt, Jr.,  
 United States District Judge.

x x x x x

MR. GOOLSBY: I don't know whether there have been some letters written to Jane Doe or Mary Roe in this case or not, but I do think the existence of this letter should prompt an inquiry by this court to determine if in fact this case has been solicited. I don't know whether it has been or not. I think the court [2a] should determine whether or not there is

a case in controversy. In fact, I might point out that Dr. Wedlock would not answer any questions that were asked him concerning whether or not these two plaintiffs received any such letters. He refused to answer the questions.

MR. SHAW: Your Honor, yesterday I served a notice to take Mrs. Edna Smith's deposition. I realize what you have said with respect to a motion to compel Dr. Wedlock to answer these questions. He refused to answer the questions. You state that no motion to dismiss has yet been filed, but Dr. Pierce's time for responsive pleadings has not yet run. My point is that the claims have not been properly put together, or there indeed is not a significant class made out. Of course we don't have the information to file a motion. That is why I kind of wanted to have an understanding of your position and some ground rules laid down so we could take these depositions and get some answers fairly soon.

THE COURT: Certainly you have the right to take the depositions.

MR. BRADLEY: I just want to respond to what Mr. Goolsby said. I don't believe



that whether or not the case was solicited has any bearing on the merits of [3a] the case. That is no ground for any dismissal or any other action.

THE COURT: I haven't run into that. There might be some action against soliciting.

MR. BRADLEY: We could file briefs on it if your Honor would like us to.

THE COURT: If that is a question, I think it should be raised, Mr. Goolsby, by way of a motion. I think you should make that contention in the form of a motion, so that we can review the law on it and determine if solicitation -- other than being improper conduct on the part of the attorney -- has got anything to do with the merits of the case. Frankly, I have never run into that proposition.

MR. GOOLSBY: When we got the letter, I just felt that we should bring it to the Court's attention.

THE COURT: I am glad you brought it to my attention. Insofar as the litigation itself is concerned, I don't know what effect that would have on the right to proceed with the litigation.

MR. GOOLSBY: We can make the motion.

THE COURT: If I were to decide that it had no bearing on the litigation itself, you may or may not want to bring the letter to the attention of the appropriate authority that is set up to handle such [4a] matters.

MR. GOOLSBY: Dr. Wedlock repeatedly refused to answer questions, and we have not ourselves given notice to take the deposition of Edna Smith. Mr. Shaw didn't tell me until this morning that he wanted to do so, and we wanted to know what your Honor's reaction was to this before we proceeded.

THE COURT: My reaction to what now?

MR. GOOLSBY: Which way to proceed with respect to any solicitation. You suggested a motion, and that is the procedure we will follow.

THE COURT: I suggested a motion, and that is the way you should proceed if you want to move that some solicitation would bar the bringing of the suit. I have never researched that issue. I have never had that issue before me before. I probably have more to do with the conduct of the lawyer once the suit is brought. What effect solicitation would have on the suit,

I am not sure.

x x x x x

THE COURT: If you determine that that is the law, you are going to have to move to dismiss the suit because of improper solicitation, using the letter, [5a] if solicitation is the basis for your motion. If solicitation becomes an issue in the case, on the right to bring the suit, then I think we would go into the question of whether they would have to answer the questions, upon a hearing on your motion. I think he is correct, that solicitation has nothing to do with the right of the plaintiffs to bring the suit. Then solicitation would be an issue before other appropriate authorities and not before the court.

x x x x x

THE COURT: Is there anything else from any of the defendants?

MR. SHAW: Your Honor, there is only one thing that I would desire to make sure that I have got our procedure right about these depositions. Am I supposed to make motions to require them to answer the questions?

THE COURT: I understand that Mr. Goolsby comes into court and moves orally to dismiss this action because there has been active solicitation, and I told him to file the motion. Active solicitation might subject the person soliciting to a criminal procedure or it might subject them to disciplinary [sic] action by the [6a] appropriate legal committee, but it has got nothing to do with the case itself.

I certify that the foregoing is a true and correct transcript of my notes.

s/ Doris C. Appleby  
Official Court Reporter.

\* \* \* \*

# REPORT OF THE PANEL OF BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

This report is found in the jurisdictional statement beginning at page 15a.

\* \* \* \*

# OPINION OF THE SUPREME COURT OF SOUTH CAROLINA

This opinion is found in the jurisdictional statement beginning at page 1a.

Supreme Court, U. S.  
FILED  
AUG 10 1977  
MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1977

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**No. 77-56**

---

IN THE MATTER OF EDNA SMITH, APPELLANT

---

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

---

**MOTION TO DISMISS OR AFFIRM**

---

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# IN THE Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77-56

---

IN THE MATTER OF EDNA SMITH, APPELLANT

---

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

---

## MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of South Carolina on the grounds that it is manifest that the decision below was clearly correct, that there are no conflicts in decisions, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## JURISDICTION

For the purpose of this Motion only, the Appellee assumes, without conceding, the Court's jurisdiction herein.



### STATEMENT

This is an appeal from the Order of the South Carolina Supreme Court, dated March 17, 1977, finding that Appellant had violated the Code of Professional Responsibility<sup>1</sup> and administering a public reprimand for her unethical conduct.<sup>2</sup>

Appellant Edna Smith is an attorney licensed to practice law in the State of South Carolina and, at the time of these events, was engaged in private practice with the Carolina Community Law Firm (the firm's name was later changed to Buhl, Smith and Bagby).<sup>3</sup> In her capacity as a private attorney, she served as legal consultant to the South Carolina Council on Human Relations, a private organization, for which she received a fee of \$10,000.00 per year.

She also acted as a cooperating attorney with the ACLU, serving as Vice-President and member of the Board of Directors of the South Carolina Chapter of that organization.

Pursuant to the request of her client, the Council on Human Rights, Appellant contacted one Gary Allen and requested that he set up a meeting between Appellant and certain women in Aiken County, South Carolina, who had been sterilized, or had been advised by their physician that they should undergo sterilization as a means of family planning. This meeting took place in the latter part of July, 1973. On the day of the meeting, a Mrs. Marietta Williams was approached by Mr. Allen as she left the Aiken County Hospital, where her newborn baby was critically ill. Mr. Allen requested that Mrs. Williams accompany him to his office, stating that there were some people at his office who

<sup>1</sup> The American Bar Association's Code of Professional Responsibility was adopted by the South Carolina Supreme Court on March 1, 1973.

<sup>2</sup> Jurisdiction Statement, App. 1a.

<sup>3</sup> Appellant's law partner, Herbert Buhl, is a staff attorney for the ACLU, receiving a salary for that position; Appellant's other law partner, Carlton Bagby, is a cooperating attorney with the ACLU.

would like to talk with her about her recent sterilization. Mrs. Williams, although she had no previous knowledge of the meeting, went to Mr. Allen's office, where she was introduced to Appellant Edna Smith. During the meeting which was attended by two other ladies and members of the press, Appellant advised Mrs. Williams of her legal rights and remedies in regard to her sterilization and informed her of her right to bring an action for money damages against her doctor. In talking with Mrs. Williams and the other ladies, Appellant represented herself to be an attorney and informed the group that the ACLU was an organization that could bring an action on their behalf for money damages against Dr. Pierce, a private physician in Aiken County. After discussing her sterilization with Appellant and being fully advised of her legal rights and remedies, Mrs. Williams informed Appellant that she would contact Appellant, if she decided to bring such an action.

Appellant gave instructions that the ladies should write the ACLU if they desired that organization to bring suit for them. In the early part of August, only one request had been received. Appellant was instructed by the ACLU to contact the other ladies again about filing suit. On August 30, 1973, without having been contacted by Mrs. Williams in any way during the interim, Appellant wrote to Mrs. Williams on the stationery of her private law firm, signing the letter as Attorney-at-Law. In this letter, which was the subject of the disciplinary action, Appellant stated:

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

. . .

About the lawsuit, if you are interested, let me know, and I'll let you know when we will be coming down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf. Jurisdictional Statement, App. 25a.

By Appellant's own admission at the disciplinary hearing, the letter was an attempt by her to seek out Mrs. Williams as a member of the plaintiff class in a lawsuit for money damages against the doctor who had performed the sterilization operation. Shortly thereafter, Mrs. Williams called Appellant and informed her that she did not want to bring a legal action against Dr. Pierce.

Subsequently, two women did sue Dr. Pierce for money damages.<sup>4</sup> The ladies were presented by attorneys of the American Civil Liberties Union (including Appellant's law partner, Carlton Bagby) who requested on behalf of their clients that the court award attorneys fees.

A hearing was held before a Panel of Board of Commissioners on Grievances and Discipline on March 20, 1975, at which time Appellant was afforded opportunity to answer the charges. On October 7, 1975, the Panel filed its Report finding Appellant guilty of misconduct in that she violated certain rules of the Court's Code of Professional Responsibility. The Panel recommended that a private reprimand be administered. This Report was affirmed by the full Board on January 9, 1976.

On July 27, 1976, Appellant petitioned the South Carolina Supreme Court to review the disciplinary action pursuant to Section 34 of the Court's Rule on Disciplinary

<sup>4</sup> *Doe v. Pierce*, No. 74-475 (D.S.C. 1974). Plaintiffs requested \$15,000,000.00 in damages. This case was tried before a jury and resulted in a verdict against Dr. Pierce for one of the plaintiffs in the amount of \$5.00 nominal damages. On appeal, the Fourth Circuit Court of Appeals reversed this judgment finding that Dr. Pierce had not violated that plaintiff's civil rights under Section 1983.

Procedure.<sup>5</sup> On September 13, 1976, the South Carolina Supreme Court ordered that the record in Appellant's case be certified to it for review and oral arguments. On March 17, 1977, the South Carolina Supreme Court issued its opinion finding Appellant guilty of misconduct and administering a public reprimand.

## ARGUMENT

### I

#### The decision below is clearly correct

The South Carolina Supreme Court held that Appellant had violated Disciplinary Rules 2-103(D)(5)(a) and (c) and 2-104(A)(5) of its Code of Professional Responsibility. DR 2-104(A)(5) provides, *inter alia*, that:

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice except that:

• • •

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, *but shall not seek*, employment from those contacted for the purpose of obtaining their joinder. (Emphasis added.) Jurisdictional Statement, App. 21a-22a.

The facts of this case readily establish a violation of this provision. It is uncontested that Appellant arranged a

<sup>5</sup> Section 34 of the Rule on Disciplinary Procedure provides: Nothing in these Rules shall be construed to deprive the Supreme Court of the authority to require the certification to it of the record in any case, for such action as it deem proper. In *Burns v. Clayton*, 237 S. C. 316, 331, 117 S. E. (2d) 300, 301 (1960), the South Carolina Supreme Court stated: The Board's report is advisory only, this Court is nowise bound to accept its recommendations; and upon this Court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate disciplinary action thereabout.



meeting in Aiken, South Carolina, where she gave unsolicited legal advice to several women concerning their sterilization and further advised them of the availability of the American Civil Liberties Union to bring legal action in their behalf. Having given this advice, the attorney in a class action is prohibited by DR 2-104(A)(5) from seeking out members of the plaintiff class. By her own testimony, Appellant admitted that this was the very purpose of her August 30, 1973, letter, which was the subject of this disciplinary action.

Appellant's contention that DR 2-104(A)(5) merely prohibits acceptance of employment and not, as here, the seeking of employment<sup>6</sup> is a pregnable misreading of the disciplinary rule and would render meaningless the words "may accept, but shall not seek," if not subparagraph (5) in its entirety. Appellant has erroneously limited her argument to the provisions in DR 2-104 dealing with acceptance of employment, totally ignoring the language of subparagraph (5) which obviously deals with *seeking* employment in class actions. It was this latter subparagraph which the South Carolina Supreme Court found that Appellant had violated.

The Court also found that Appellant had violated Disciplinary Rule 2-103(D)(5)(a) and (c), which provides, *inter alia*, that:

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in be-

<sup>6</sup> Jurisdictional Statement, pages 22-24. It would seem a matter of common sense that if an attorney was ethically prohibited from accepting employment that he would also be prohibited from seeking such clients for the purpose of accepting employment.

half of his client without interference or control by any organization or other person:

• • •

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

• • •

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer. Jurisdictional Statement, App. 19a-20a.

In this regard, the Court found that Appellant had violated the above rule by promoting the use of ACLU attorneys, which included not only herself but her private law partners<sup>7</sup> and which would financially benefit the ACLU. Appellant maintains that she did not violate this provision, because she did not promote the use of any particular attorney.<sup>8</sup> However, the Court found that Appellant had pro-

<sup>7</sup> Appellant's law partner, Carlton Bagby, was an attorney of record in *Doe v. Pierce*, *supra*. Furthermore, Appellant's other law partner, Herbert Buhl, is a salaried staff attorney of the ACLU. Testimony at the disciplinary hearing established that attorneys fees received by the ACLU went into the general fund from which its staff attorneys' salaries were paid.

<sup>8</sup> Mrs. Marietta Williams testified that Appellant stated to her at the July, 1973, meeting that Appellant would be her attorney if the ACLU brought an action for Mrs. Williams. It would be reasonable to conclude that the August 30, 1973, letter was a reiteration to Mrs. Williams that if the ACLU brought her action, Appellant would be the ACLU attorney representing her.



moted the use of particular attorneys—i.e., her associate attorneys in the ACLU.<sup>9</sup>

This court has long recognized the legitimate interest that the states have in regulating professional misconduct in the bar.<sup>10</sup> In this regard, the South Carolina Supreme Court has adopted and enforced rules prohibiting the solicitation of legal business.<sup>11</sup> Indeed, this Court has recently recognized that restraints on personal solicitation of legal business may be justified. *Bates v. State Bar of Arizona*, 45 U. S. L. W. 4895 (U. S. No. 76-316, June 27, 1977). It should be noted at the outset that the present case does not involve the same practical considerations which concerned the Court in *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. (2d) 405 (1963), its progeny of cases,<sup>12</sup> and in *Bates*, *supra*. In the present case, the aggrieved party had already received information regarding her legal rights and the appropriate means for effectuating them. She was also aware that the ACLU was an organization that she could go to if she wanted to bring a lawsuit. Therefore, she had meaningful access to the courts. Her response to Appellant as she

<sup>9</sup> Appellant's argument would be tantamount to permitting solicitation on behalf of law firms or other legal organizations, as long as the individual attorneys who would be ultimately responsible for the litigation were not mentioned. This would, of course, be to the distinct disadvantage of sole practitioners and small law firms. Certainly in this regard, Appellant is guilty of her own "Draconian" construction of the disciplinary rule and creates a distinction without a difference.

<sup>10</sup> See, *Cohen v. Hurley*, 366 U. S. 117, 81 S. Ct. 954, 6 L. Ed. (2d) 156 (1961); *Theard v. United States*, 354 U. S. 278, 77 S. Ct. 1274, 1 L. Ed. 1342 (1957); *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. (2d) 405 (1963); *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 95 S. Ct. 2004, 44 L. Ed. (2d) 572 (1975).

<sup>11</sup> See, e.g., *Ex parte Finley*, 93 S. C. 37, 81 S. E. 952 (1914); *In re Crosby*, 256 S. C. 325, 182 S. E. (2d) 289 (1971); *In re Hartzog*, 257 S. C. 84, 184 S. E. (2d) 116 (1971); *In re Bloom*, 265 S. C. 86, 217 S. E. (2d) 143 (1975); *In re Craven*, 267 S. C. 33, 225 S. E. (2d) 861 (1976); Appellant's assertion that ethical strictures on solicitation have received little enforcement in South Carolina prior to July, 1975 (Jurisdictional Statement, page 16) is completely unfounded.

<sup>12</sup> *Brotherhood of R. R. Trainmen v. Virginia*, 377 U. S. 1, 84 S. Ct. 1113, 12 L. Ed. (2d) 89 (1964); *United Mine Workers v. Illinois State Bar Assn.*, 389 U. S. 217, 88 S. Ct. 353, 19 L. Ed. (2d) 426 (1967); *United Transportation Union v. Michigan*, 401 U. S. 567, 91 S. Ct. 1076, 28 L. Ed. (2d) 339 (1971).

left the July, 1973, meeting was "if I need your help I will call you." The inquiry thus becomes: May an attorney after having informed a layman of his legal rights and a means of effectuating those rights, attempt to induce or pressure that person to allow the attorney, his firm or organization, to bring suit in his behalf? The dangers in allowing such conduct have been thoroughly discussed by members of the profession,<sup>13</sup> and include overreaching,<sup>14</sup> misrepresentation, stirring-up litigation,<sup>15</sup> preserving the dignity of the profession,<sup>16</sup> and adversely effecting disciplinary enforce-

<sup>13</sup> See, e.g., Comment, *Sherman Act Scrutiny of Bar Restraints On Advertising and Solicitation*, 62 VA. L. REV. 1135, 1152-1164 (1976).

<sup>14</sup> "Overreaching" refers to the aggressive competition among lawyers for clients which leads to lawyers approaching clients at times when the clients are in no condition to properly consider retention of a lawyer. See, Comment, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L. J. 1181, 1184 n. 23 (1972). Mrs. Williams testified that at the time of the July, 1973, meeting and the subsequent August 30, 1973, letter, her child was in the hospital suffering from dehydration and was not expected to live. She informed Appellant that she did not have time to think of suing anyone because of her baby's illness. However, the pressure upon her to bring a lawsuit was considerable as her own testimony reveals:

... I got tired of everybody aggravating me. Everybody was coming to ask me wasn't I going to sign to file a lawsuit. And after I had said a hundred times I didn't want to sue then I got the notion that maybe if I sue maybe then they will leave me alone, I'm tired of being bothered.

<sup>15</sup> Appellant attempted to persuade Mrs. Williams to file a lawsuit for money damages against her obstetrician. Such private litigation would invariably induce a breach in that doctor-patient relationship. This court recognized in *Button*, *supra*, the continued hostility to stirring-up private litigation which interferes with established relationships. Could a doctor be expected always to give his patient the best medical advice, if he knows an attorney could solicit his patient subsequently to bring a lawsuit against him? Is not the doctor-patient association due some protection under the First Amendment from competitive solicitation of lawsuits by attorneys?

<sup>16</sup> One of the most important consumer interests which the disciplinary rules have sought to protect is the professional competence of attorneys. By forcing an attorney to depend upon his reputation in order to retain old clients and attract new clients, the rules have indirectly encouraged him to do a better job for his client. If an attorney could attract clients by solicitation rather than reputation, he would be more inclined to shirk his duties. This would necessarily result in irreparable harm to the dignity of the profession. One commentator has observed that solicitation is likely to do more to weaken the force of the legal profession and hinder the administration of justice than any other form of unethical conduct. Comment, *Ambulance Chasing*, 30 N.Y.U.L. REV. 182, 186 (1955). A

ment.<sup>17</sup> It is submitted that on the facts of this case, Appellant clearly violated the disciplinary rules in question. Moreover, it is equally clear that the State of South Carolina had a compelling interest in protecting Mrs. Williams from the pressures asserted upon her to file a lawsuit against her physician.

#### A. Vagueness

Appellant argues that DR 2-103(D)(5)(a) and (c) and DR 2-104(A)(5) are vague in that they do not give fair notice of the conduct proscribed. It is obvious that counsel for Appellant have encountered some difficulty in making this argument, since they continuously refer generally to DR 2-103(D) and DR 2-104(A) rather than the specific sections which the Court below found that Appellant had violated. Appellant maintains, for example, that DR 2-103(D)(5)(a) and (c) only prohibit an attorney from allowing an organization to promote his own services. This construction ignores the plain language of that statute which provides:

A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services *or those of his partners or associates*. (Emphasis added.)

In discussing DR 2-104(A)(5) Appellant maintains that this disciplinary rule only prohibits the acceptance of employment and does not prohibit seeking out a client to be a party to the litigation. Again, Appellant has ignored the

client who has been overreached, denied a just recovery, or charged an exorbitant fee is likely to circulate uncomplimentary publicity about the profession. When the public loses confidence in the bar, a doubt is created in the integrity of the court.

<sup>17</sup> Justice Powell's observations of the effects of permitting limited advertising on the policing of attorney ethics in *Bates v. State Bar of Arizona*, 45 U. S. L. W. 4895, 4907-8 (U. S. Opinion No. 76-316, June 27, 1977) apply tenfold to the issue of permitting solicitation.

plain language of that DR which provides: ". . . a lawyer may accept, but shall not seek. . ." <sup>18</sup>

Appellant attempts to avoid the plain language of these disciplinary rules by discussing them in the abstract. By avoiding the plain language of the rules and instead placing an obtuse interpretation on their terms, Appellant has attempted to show that the rules are vague and indefinite.

It is evident that the disciplinary rules in question are not so vague that "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926). It is all but frivolous to suggest that the disciplinary rules fail to give adequate warning of the activities they proscribe or to set out explicit standards for those that must apply it. *Broadrick v. Oklahoma*, 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. (2d) 830 (1973). In the instant case, Appellant's conduct falls within the "hard core" of the disciplinary rules' prohibitions. By her own testimony Appellant was attempting to solicit Mrs. Williams as a member of the plaintiff class for a class action suit which the ACLU desired to bring. Moreover, this solicitation was performed on behalf of an organization which stood to gain financially from rendering this service.<sup>19</sup> Appellant's contention that the disciplinary rules are void for vagueness is clearly erroneous and unsubstantial.

<sup>18</sup> See, ABA Informal Opinion No. 1234 which held that a "legal aid lawyer who desires to raise certain issues in litigation but who is handling no litigation involving such issues may not seek out indigents and request the indigent to, or advise the indigents to, become, as clients, parties to the litigation." The opinion found that such conduct violated provisions of DR 2-104(A) and DR 2-103(D).

<sup>19</sup> Appellant testified that her private law firm, Carolina Community Law Firm, was originally formed as a public-interest law firm to represent people in various consumer-type cases. The members of the firm hoped to support their work through grants from various foundations. In fact, at the time of her solicitation, Appellant's law firm had submitted proposals to several foundations in order to operate their firm (indeed, two of their firm's members including Appellant, were already receiving grants). Appellant admitted that in order for the firm to continue to request and to receive funds, it was necessary for them to have clients and to participate in cases involving welfare issues, prison, consumer issues, etc.



### B. Overbreadth.

Appellant asserts that the correct standard for determining whether a "communication" is protected by the First Amendment is that such conduct is protected if it has any discernable purpose in addition to attracting business for the attorney's private law practice, citing *Jacoby v. California State Bar*, 45 U. S. L. W. 2529 (California, 1977) and *Belli v. State Bar*, 10 Cal. (3d) 824 (1974). The above cases dealt with publication of news articles authorized by attorneys and not with either advertising or personal solicitation by an attorney. This Court recognized in *Bates v. State Bar of Arizona*, 45 U. S. L. W. 4895 (U. S. No. 76-316, June 27, 1977), that personal solicitation posed dangers and objections not encountered in newspaper announcement advertising. Therefore, a standard imposed for publishing news articles as in *Jacoby* and *Belli*, *supra*, cannot be applied in this case. The Court further recognized in *Bates* that the First Amendment overbreadth doctrine applies weakly, if at all, in the ordinary commercial context, noting that speech in the form of advertising which is linked to commercial well being, is unlikely to be crushed by overbroad regulation.<sup>20</sup> The Court in *Bates* refused to apply the overbreadth doctrine to professional advertising. It is submitted that a similar holding would follow in this case, and the Court must consider the South Carolina Supreme Court's rules under the traditional rule that a statute cannot be challenged on the ground that such statute might be applied unconstitutionally in circumstances other than those before the Court. Therefore, the question in this case is not whether the disciplinary rules are overbroad, but rather whether Appellant's specific conduct is within the scope of the First Amendment.

<sup>20</sup> *Id.* at 4903.

## II

### There are no conflicts in decisions

Appellant asserts that the decision in the instant case is contrary to this Court's decisions in *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. (2d) 405 (1963); *Brotherhood of R. R. Trainmen v. Virginia*, 377 U. S. 1, 84 S. Ct. 1113, 12 L. Ed. (2d) 89 (1964); *United Mine Workers v. Illinois State Bar*, 389 U. S. 217, 88 S. Ct. 353, 19 L. Ed. (2d) 426 (1967); *United Transportation Union v. Michigan*, 401 U. S. 567, 91 S. Ct. 1076, 28 L. Ed. (2d) 339 (1971). However, the facts of this case are readily distinguishable from the facts and holdings of the above decisions.

In the first instance, the aggrieved party was not a member of the ACLU or any other organization. Therefore, the holding of the "union cases" which recognized the right of union members to undertake collective activity in order to obtain meaningful access to the courts, is not applicable to this case.<sup>21</sup> The decision below turns upon its own facts. The aggrieved party was aware of her legal rights and of means of access to the courts prior to Appellant's letter of August 30, 1973; therefore, the Court's traditional concern of informing the public so as to afford the aggrieved party meaningful access to the court—i.e. due process of law—is not present in the instant case.<sup>22</sup>

Moreover, *NAACP v. Button* is also not apposite of this case. In *Button*, the State of Virginia had passed a statute<sup>23</sup> which prohibited solicitation of legal business by defining a "runner" or "capper", by defining those terms to

<sup>21</sup> In the union cases the Court recognized that the unions (unlike the ACLU here) had no financial interest in the litigation. *See, United Transportation Union v. Michigan*, *supra*, at 583, 91 S. Ct. at . . . , 28 L. Ed. (2d) at 345-6.

<sup>22</sup> *See, Bates v. State Bar of Arizona*, 45 U. S. L. W. 4895 (U. S. No. 76-316, June 27, 1977).

<sup>23</sup> § 54-78, Code of Virginia (1950), as amended by Acts of 1956, Ex. Sess., c. 33.



include the use of an agent for an organization which retains an attorney in connection with an action to which it is not a party and in which it has no pecuniary right or liability. It was obvious that the State of Virginia had broadened the previous law to threaten civil rights group activities, particularly those of the NAACP. No attempt had been made prior to 1956 to proscribe the activities of the NAACP which had been carried on openly for years. The only question before the Court was the constitutionality of that statute as applied to the NAACP.

The Court found the statute to be unconstitutional, not because it prohibited particular acts as solicitation, but because it proscribed any arrangement by which prospective litigants are advised to seek the assistance of counsel. *NAACP v. Button*, *supra*, at 434, 83 S. Ct. . . . , 9 L. Ed. (2d) at 418. Contrary to the assertion of Appellant, the rules involved herein do not prohibit attorneys from accepting referrals of *pro bono* cases<sup>24</sup> nor do they prevent an attorney from advising citizens of their rights and of the availability of counsel.<sup>25</sup>

The Court in *Button* placed importance on the fact that the legal actions undertaken by the NAACP were against government, whether federal, state or local, for the achievement of lawful objections of equality of treatment. Thus, litigation became a form of political expression, and the Court held that the First and Fourteenth Amendments protect orderly group activities whereby minorities seek through lawful means to achieve legitimate political ends. In this respect this Court observed:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all governments, federal, state and

<sup>24</sup> Appellant's Jurisdictional Statement, page 20.

<sup>25</sup> Appellant's Jurisdictional Statement, page 11.

local, for the members of the Negro community in this country. It is thus a form of political expression. *Id.* at 430, 83 S. Ct. at . . . , 9 L. Ed. (2d) at 416.

The instant case differs from *Button* in two important respects: first, the lawsuit was not against government but against a private physician, *ergo*, private litigation<sup>26</sup> and not political expression; secondly, monetary stakes were involved. On the latter point, the Court in *Button* noted that because no monetary stakes were involved, there was no likelihood of a conflict between the aims and interests of the NAACP, and its member and nonmember Negro litigants.<sup>27</sup> While it is true that in subsequent cases, this Court has extended First Amendment protection to the collective activity of unions even in personal injury cases, those cases are not controlling of the case at hand. In the union cases, the court sought to protect the rights of union members to associate for the purpose of facilitating the securing of legal benefits for each other. In the instant case, Mrs. Williams did not belong to any union or organization; therefore, the First Amendment's right of association is not at issue.<sup>28</sup>

It is apparent that the facts in this case are quite different from the cases cited by Appellant. The disciplinary rules in question were not adopted as a means of suppressing civil rights group activities, but rather were formulated by the American Bar Association and have been

<sup>26</sup> The Court in *Button* recognized the traditional condemnation of conduct of attorneys in urging another to engage in private litigation. *Id.* at 441, 83 S. Ct. at . . . , 9 L. Ed. (2d) at 423.

<sup>27</sup> In a subsequent lawsuit, *Doe v. Pierce*, No. 74-475 (D.S.C. 1974), the ACLU brought action on behalf of two women asking for monetary damages of \$7,500,000.00 for each plaintiff. It is obvious with such a large amount of money at stake that the aim and interest of the ACLU, *i. e.*, to protect civil liberties (Jurisdictional Statement, page 21), may diverge from the aim and interest of the client, *i. e.* to recover monetary damages. It is interesting to note the emphasis placed by Appellant in her letter of August 30, 1977, on monetary recovery rather than rectification of civil liberties.

<sup>28</sup> There was no evidence presented at the disciplinary hearing that any member of the ACLU had been sterilized by Dr. Pierce or threatened with sterilization.

adopted by most states. These rules are not overbroad, as the Virginia statute in *Button*, in that they do not prohibit any arrangement by which an individual refers or recommends a particular lawyer. On the contrary, the rules as applied to Appellant only restrict an attorney, who has previously given unsolicited advice to a layman of his legal rights and further has advised him of his means to effectuate his rights, from seeking that person (either for himself or for an organization to which he belongs and whose primary purpose includes the rendition of legal services) as a plaintiff in a class action against a private defendant for money damages.

The decision below likewise does not conflict with this Court's decision in *In re Ruffalo*, 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. (2d) 117, *reh. den.* 391 U. S. 961, 88 S. Ct. 1883, 20 L. Ed. (2d) 874 (1968). In *Ruffalo*, an Ohio attorney, who had been charged with solicitation through an agent, defended against this charge by personally testifying that he had merely hired the individual to investigate cases, including cases against the agent's other employer. At the conclusion of his testimony, Bar counsel amended his complaint to further allege that attorney Ruffalo was guilty of unethical conduct by hiring an individual to investigate that individual's employer. No additional evidence was taken on the matter. The Supreme Court of Ohio subsequently found that Ruffalo had engaged in unethical conduct, including the latter charge. The Court found that Ruffalo had no notice that his hiring the agent would be a disbarment offense until after he and the agent had testified. The Court went on to hold that a disciplinary proceeding was quasi-criminal in nature; therefore, the attorney must have fair notice of the charges made and be afforded opportunity for explanation and defense.

Even though this Court opined that a disciplinary proceeding was quasi-criminal in nature, it did not hold that a disciplinary proceeding must comply with all of the formalities and technical requirements of a purely criminal proceeding. In *Burns v. Clayton*, 237 S. C. 316, 117 S. E. (2d) 300 (1960), the South Carolina Supreme Court held that:

Technical formality of allegation, as in an indictment, is not required in proceedings such as the present. All that is requisite to their validity is that the respondent be clearly apprised of the charges, *i. e.*, the facts upon which the claim of misconduct is founded, and that he be afforded reasonable opportunity for explanation and defense. *Id.* at 333, 117 S. E. (2d) at 308.<sup>29</sup>

In the instant case the complaint charged Appellant with solicitation and attached a copy of Appellant's letter of August 30, 1973, which was a basis for this charge. The South Carolina Supreme Court found Appellant guilty of solicitation. The complaint was never amended to allege any new offense as occurred in *Ruffalo*, and Appellant was given full opportunity to be heard on the charge. The Court below was clearly correct in concluding that Appellant was apprised of the charges against her. *See*, Jurisdictional Statement, App. 8a.<sup>30</sup>

<sup>29</sup> *See also*, Seventh District Committee of the Virginia State Bar v. Gunter, 212 Va. 278, 183 S. E. (2d) 713 (1971); *In re Kemp*, 40 N. J. 588, 194 A. (2d) 263 (1963) (The New Jersey Court rejected the contention that a complaint must specify the Canon or disciplinary rule violated).

<sup>30</sup> The court noted that even if she had not been fully apprised of the charges, the proper procedure would have been to move the court to have the complaint made more definite and certain. Jurisdictional Statement, App. 8a. However, it is clear from the record that Appellant was aware of the charges and the applicability of DRs 2-103(D)(5)(a) and (c) and 2-104(A)(5). Both rules were discussed by counsel on Appellant's motion to dismiss made at the disciplinary hearing at the close of the Complainant's case. In addition, Appellant presented two out-of-state witnesses who testified to the nature of services offered by the ACLU as these services apply to DR 2-103(D)(5)(a) and (c). In fact, Appellant attempted to qualify one witness as an expert in constitutional law in order to have him answer a hypothetical question as to whether Appellant was guilty of a violation of the disciplinary rules.

Therefore, the decision of the court below does not conflict with *Button*, *Ruffalo* or any other decision of this court.<sup>31</sup>

### III

#### There is no substantial federal question

In *Button*, *Brotherhood of R.R. Trainmen*, *United Mine Workers*, and *United Transportation Union*,<sup>32</sup> cases cited by Appellant in support of her argument that the questions are substantial, the Court has focused on the *right of association of potential litigants*. Thus, this Court has held that union members can engage in collective activity for the purpose of facilitating their access to the courts. Furthermore, members of a minority can associate to litigate against government as a means of political expression.

Even though no member of the ACLU was an aggrieved party and the litigation was not a form of political expression against government, Appellant asserts that the above cases extend First Amendment protection to an attorney seeking-out non-member clients for the purpose of bringing a lawsuit for money damages against a private defendant. In other words, Appellant maintains that the First Amendment protects the right of an attorney to litigate. This Court, however, has never held that the First Amendment protects against reasonable state regulation either the right of an *attorney* to litigate or the right of an *attorney* to associate with a prospective client. If these cases were given such an effect, it would destroy the long-

<sup>31</sup> See, discussion under Argument I as to the sufficiency of evidence to establish Appellant's guilt. Since there was evidence of guilt, this case does not conflict with *Thompson v. City of Louisville*, 362 U. S. 199, 80 S. Ct. 624, 4 L. Ed. (2d) 654 (1960).

<sup>32</sup> *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. (2d) 405 (1963); *Brotherhood of R. R. Trainmen v. Virginia*, 377 U. S. 1, 84 S. Ct. 1113, 12 L. Ed. (2d) 89 (1964); *United Mine Workers v. Illinois State Bar*, 389 U. S. 217, 88 S. Ct. 353, 19 L. Ed. (2d) 426 (1967); *United Transportation Union v. Michigan*, 401 U. S. 576, 91 S. Ct. 1076, 28 L. Ed. (2d) 339 (1971).

standing rules and concepts forbidding the solicitation of legal business, the intervention of lay intermediaries between the attorney and his client, and the aiding of the unauthorized practice of law, thus resulting in the complete erosion of the traditional attorney-client relationship. Moreover, if Appellant as an attorney has the right to litigate or to associate with a client for the purpose of bringing litigation, can any rational distinction be made between Appellant and any private practitioner? The obvious result would be the total elimination of restrictions on solicitation.

The Appellant's arguments that her acts were protected by the First Amendment are unsubstantial. The legitimate need for protecting the public and the profession against personal solicitation was recently recognized by this Court:

[W]e also need not resolve the problems associated with in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or “runner”. Activity of that kind might pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising.<sup>33</sup>

<sup>33</sup> *Bates v. State Bar of Arizona*, 45 U. S. L. W. 4895, 4899 (U. S. No. 76-316, June 27, 1977).



**CONCLUSION**

Wherefore Appellee respectfully submits that the decision below was clearly correct, that there are no conflicts of decisions, and that the questions upon which the cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of South Carolina.

Respectfully submitted,

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1977

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No. 77-56

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IN THE MATTER OF EDNA SMITH,

Appellant.

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ON APPEAL FROM THE  
SUPREME COURT OF THE  
STATE OF SOUTH CAROLINA

---

REPLY TO MOTION TO DISMISS OR AFFIRM

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## ARGUMENT

### I. The Disciplinary Rules, as Construed, Are Vague and Overbroad.

Each of the disciplinary rules at issue defines a violation in its initial sentence; then, the subsections define exempt situations in which conduct otherwise proscribed is permitted.<sup>1</sup> Neither the appellant nor anyone else could have had notice that these subsections, on their face limiting the scope of the rule, would be held to extend the application of the rule to conduct not otherwise proscribed.<sup>2</sup>

In any event, the rules as construed are overbroad. For example, the State interprets DR 2-103(D) to prohibit an attorney from allowing any non-exempt organization to promote

1. The subsections are prefaced, in DR 2-103(D) by "However, he may...", and in DR 2-104(A) by "except that...."

2. The court applied one rule in any unforeseeable way by construing DR 2-104(A)(5) to create a violation for offering the assistance of an organization to any member of any plaintiff class, even though the rule requires on its face that "success in asserting rights or defenses of his client in litigation in the nature of a class action [be] dependent upon the joinder of others" (appellant had no client, and, in any event, success would not have depended upon joinder).

the services of his associates,<sup>1</sup> and also from offering the services of any organization to which he belongs for a possible class action.<sup>2</sup> According to the State's interpretation (not clearly stated by the court below), the referral of a pro bono case is "promotion" of an attorney's services. Therefore, since the state court found that the ACLU is not an exempt organization, any attorney who accepts a pro bono case referred by the ACLU has violated the rule; and any attorney who belongs to the ACLU cannot offer the services of the ACLU to any member of any plaintiff class.

According to the State, "the rules involved herein do not ... prevent an attorney from advising citizens of their rights and of the availability of counsel."<sup>3</sup> But that is all Edna Smith did to be disciplined. Appellant advised Mrs. Williams in July, 1973, of her legal rights, and later advised her that the ACLU was interested in making counsel available to her.

The State proposes a most novel defense of its position -- that when the letter was written "[t]he aggrieved party was aware of her legal rights and of means of access to the courts..." Ibid. The State's position

I. Motion to Dismiss or Affirm, 10. The language of the rule is "assist," not "allow."

2. Ibid., 16.

3. Ibid., 14.

appears to be that when an attorney follows the dictates of Canon 2, the attorney must first ascertain that the individual is ignorant of his or her rights. The State again inserts an element of the charge which the rule's language and the record do not support.

The letter which is the basis of the charge advised Mrs. Williams that the ACLU would be interested in bringing a lawsuit. This was new information as to the availability of counsel. While the State repeatedly claims that the women at the meeting were there advised that the ACLU was available to represent them, Motion to Dismiss or Affirm, 3, 5-6, 7, n. 8, and 8, this is of whole cloth. Mrs. Williams, the State's only witness, never mentioned the ACLU in forty-four (44) pages of testimony.<sup>1</sup>

Appellant testified that she told the individuals at the meeting that she was an attorney but she could not recall whether or not she mentioned her association with the

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1. Mrs. Williams twice changed her testimony when asked if appellant had offered to be her attorney. TR. 7, 17, 26, 35. From this, and the incorrect assertion that appellant had offered the assistance of the ACLU at the meeting, the State interprets the August 30, 1973, letter as a reiteration that appellant would be Mrs. Williams' ACLU attorney. Motion to Dismiss or Affirm, 7, n. 8.

ACLU. TR. 63. She said she did not offer to represent anyone at the meeting, ibid., and that while she discussed the ACLU with Gary Allen at the meeting, this was in a conversation with him and she was not certain if others in the room heard this. TR. 96. Her testimony was explicit that she did not know at the time of the meeting that the ACLU would support possible litigation, ibid., so an offer would hardly have been likely, despite the fact that no testimony exists that the assistance of ACLU was then offered.<sup>1</sup>

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1. The tribunals below made no finding that Mrs. Williams was fully aware of her rights and the availability of counsel after the July meeting. Mrs. Williams, with a ninth grade education, TR. 12, 42, whose testimony evidenced a lack of stability, a condition which the record otherwise reflects, TR. 159, 14-15, was, in the view of the State, fully apprised of her legal situation after one meeting. The Code of Professional Responsibility's Ethical Considerations acknowledge that an attorney's responsibility may vary according to the intelligence, experience and mental condition of the client. See EC 7-11. Appellant's letter refutes the stated position for appellant wrote that she "would like to explain what is involved so you can understand what is going on." Jurisdictional Statement Appendix, 25a. It ill behooves the State to make this argument de hors the record, for its objection stopped appellant from testifying as to her observation of the meeting participants' understanding of their rights. TR. 70-72.



Significantly, the State's defense of this disciplinary action is based upon an inaccurate statement of the facts. The first time appellant met Mrs. Williams (the person allegedly "solicited") was at a meeting arranged by Gary Allen, not by appellant,<sup>1</sup> and Mr. Allen (an old family friend, TR. 37) invited Mrs. Williams and her grandmother to come to the meeting. Mrs. Williams came voluntarily, and she knew before she came that the meeting was for her to obtain legal advice.<sup>2</sup> At that meeting, appellant simply answered questions asked about the legal rights and remedies of women compelled to accept sterilization as a condition of receiving government Medicaid services. Appellant had not previously discussed the situation with the ACLU and she did not then advise anyone to write to the ACLU for

1. Contrary to Motion to Dismiss or Affirm, 2, Gary Allen called the South Carolina Council on Human Rights about the situation. TR. 141. That office asked appellant to investigate and to call Gary Allen who would arrange a meeting. TR. 59-60, 152-53.

2. TR. 151, 16-17. Appellant definitely does challenge the assertion that the initial advice was "unsolicited," contrary to the Motion to Dismiss or Affirm, 6.

assistance.<sup>1</sup> Appellant later received a request from Gary Allen to write to Mrs. Williams, and she did so. One meeting and one letter were the only contacts appellant had with Mrs. Williams before she advised appellant that she did not wish to bring suit.<sup>2</sup> There was only an offer of legal assistance (not pursued when declined) to help redress an abuse perceived to exist in a government program. This case quite simply does not involve solicitation "at the hospital room or the accident site, or in any other situation that breeds undue influence." Bates v. State Bar of Arizona, \_\_\_ U.S. \_\_\_, 97 S.Ct. 2691, 2700 (1977).<sup>3</sup>

1. See, supra, 3-4.

2. Mrs. Williams alleged that she was pestered by persons other than appellant, names unspecified. Appellant and Mrs. Williams first met at the meeting, where the latter mentioned her child's condition. TR. 17. She testified that appellant "did not attempt to persuade or pressure me to file this lawsuit." TR. 26. There is no assertion that appellant knew the condition of Mrs. Williams' child in August.

3. In its motion, 8, n. 11, the State challenges the assertion that ethical strictures against solicitation received little enforcement prior to the issuance of the complaint herein. However, the cases misleadingly cited "e.g." are all the instances of public enforcement against solicitation in South Carolina; in the entire history of the state there were only three reported cases prior to the issuance of this complaint.

II. The State Misinterprets NAACP v. Button, 371 U.S. 415 (1963) and its Progeny, and Misrepresents the Record.

The State employs an exceedingly narrow view of the first amendment, a view which this Court has repeatedly rejected. In furtherance of its argument, the State misrepresents the record.

The State disposes of "the 'union cases'"<sup>1</sup> by the simply assertion that "the aggrieved party was not a member of the ACLU..." Motion to Dismiss or Affirm, 13. The fact that NAACP v. Button, 371 U.S. 415 (1963), involved advising nonmembers of the NAACP does not deter the State.

But NAACP v. Button 371 U.S. 415 (1963), remains a problem for the State. It sets up false distinctions. First it claims Button was based on the "political" rights involved. To the contrary, this Court clearly said that this was not critical, and held the statutes

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1. Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); United Mine Workers of America v. Illinois State Bar Association., 389 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

unconstitutional of their face for infringement on the first amendment.<sup>1</sup> The State pays no heed to the subsequent cases of this Court which applied the first amendment to associational activities to advance monetary claims.

Additionally, the State falsely claims that Doe v. Pierce, (D.S.C. No. 74-475) "was not against government but against a private physician, ergo, private litigation and not political expression;..." Motion to Dismiss or Affirm, 15. But that suit sought damages and declaratory injunctive relief against the physician for acting under color of state law as a provider of Medicaid services -- a state and federal program. Other defendants were the county hospital and certain of its officials, and the state and county directors of social services.<sup>2</sup>

In footnote 27 of their motion, the State also multiplies ten fold the amount of damages sought, and claims the August 30, 1973, letter emphasized money. Money is mentioned once, and the letter also states,

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1. The State suggests Button is inapposite because Virginia had amended its statutes to threaten the NAACP. Motion to Dismiss or Affirm, 14. But Button said that even the pre-dating American Bar Association Canons of Ethics could not justify the infringement on first amendment rights. 371 U.S. 425-26, 444-45.

2. The State has been represented in these proceedings by some of the same attorneys who represented the state and county social service directors in Doe v. Pierce.

"This practice must stop." Jurisdictional Statement, 25a. Mrs. Williams testified one of the main things discussed at the meeting was the right not to be pressured into sterilization. TR. 46.

The sterilization litigation was at its core an effort to correct a perceived abuse of rights by the state and federal government. It was not "oppressive, malicious, or avaricious use of the legal process" nor "an object of general competition among [South Carolina] lawyers." 371 U.S. at 443.

No attorney could profit financially from representing Mrs. Williams for the ACLU; the only financial benefit was a speculative recovery of fees by the ACLU as an organization. That fees are now sought in civil rights cases is of no moment, for even in NAACP v. Button, 371 U.S. 415, 420 (1963), the staff attorneys were compensated for "solicited" cases. Therefore, the overbreadth analysis of Button is applicable.

### III. The Lack of Notice and of Proof of All Facts Essential to Establish Violations of the Cited Rules Violated Due Process.

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The State asserts that appellant had fair notice of the charges against her, but its brief establishes the contrary, quite convincingly. The State takes the position that, to be given fair notice of the charges, the person disciplined must be given "the facts upon which the claim of misconduct is founded."<sup>1</sup> But, a comparison of the complaint with the full statement of the necessary facts shows that this was not done below.

The State now describes the facts necessary in order to establish a defensible disciplinary violation as follows:<sup>2</sup>

"... an attorney, who has previously given unsolicited advice to a layman of his legal rights and further has advised him of his means to effectuate his rights [is prohibited] from seeking that person (either for himself or for an organization to which he belongs and whose primary purpose includes the rendition of legal services) as a plaintiff in a class action against a private defendant for money damages."

- 
1. Motion to Dismiss or Affirm, 17.
  2. Ibid., 16.



The complaint herein simply charges appellant with "solicitation" and attached her letter. Neither in the complaint nor the letter are any of the following elements of the State's summary of the charge:

- (1) That appellant previously gave unsolicited legal advice to Mrs. Williams;
- (2) That appellant previously advised Mrs. Williams that practical means to effectuate her rights were in fact available;
- (3) That the primary purpose of the ACLU is to render legal services;
- (4) That the litigation was contemplated against Dr. Pierce in his private capacity; and
- (5) That a class action was contemplated at the time of the letter dated August 30, 1973.

In fact, no evidence sustained the first four points,<sup>1</sup> and the only evidence that could establish the fifth point was appellant's own testimony obtained in fashion very similar to

1. The facts were that:

(1) Mrs. Williams solicited appellant's advice by voluntarily attending a meeting where she knew that she could ask about her legal rights;

(Footnote continued to next page.)

the procedure in In re Ruffalo, 390 U.S. 544 (1968), in that the testimony was obtained by interrogating plaintiff when she had never been formally advised by the Grievance Board that offering legal assistance to the possible plaintiff in a class action was culpable conduct with which she was charged.<sup>1</sup>

#### CONCLUSION

Appellant submits that the Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

LAUGHLIN McDONALD  
NEIL BRADLEY  
CHRISTOPHER COATES  
RAY P. McCLAIN  
ATTORNEYS FOR APPELLANT

(Footnote continued from preceding page.)

(2) appellant did not know of any counsel available at the time of the July meeting;

(3) the ACLU's purpose is to protect civil liberties, by any appropriate lawful means, just as the NAACP uses litigation to further equal rights; and

(4) the litigation ultimately brought against Dr. Pierce named him as an agent of the State, acting under color of state law. See, supra, 8.

1. Indeed, the State never made any effort to establish this element. The only testimony bearing on this was six leading questions directed to appellant by a panel member, TR. 101-03, and the answer was that at the time of the letter appellant had no knowledge of whether or not there would be class action litigation.

NOV 23 1977

MICHAEL RODAK, JR., CLERK

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1977

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No. 77-56

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IN THE MATTER OF EDNA SMITH,

Appellant.

---

On Appeal From The  
Supreme Court of The  
State of South Carolina

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BRIEF FOR THE APPELLANT

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IN THE  
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IN THE MATTER OF EDNA SMITH,  
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On Appeal From The  
Supreme Court of The  
State of South Carolina

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BRIEF FOR THE APPELLANT

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OPINION BELOW

The opinion of the Supreme Court of the State of South Carolina, J.S.A. 1a-14a,<sup>1</sup> is reported at 268 S.C. 259, 233 S.E.2d 301 (1977).

JURISDICTION

The final order and opinion of the Supreme Court of the State of South Carolina was entered on March 17, 1977. J.S.A. 1a-14a. On June 15, 1977, by Order of the

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1. "J.S.A." refers to the Jurisdictional Statement Appendix, and "App." refers to the single appendix to the briefs.

Chief Justice, the time within which to docket the appeal was extended to July 11, 1977. The jurisdictional statement was filed and the appeal docketed on July 9, 1977, and probable jurisdiction was noted on October 3, 1977. 46 LW 3179. The jurisdiction of the Court rests on 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS  
AND RULES INVOLVED.

UNITED STATES CONSTITUTION, Amendment One.<sup>1</sup>

UNITED STATES CONSTITUTION, Amendment Fourteen, Section 1.<sup>1</sup>

Supreme Court of South Carolina, Rule on Disciplinary Procedure, Section 4.<sup>2</sup>

Disciplinary Rule 2-103(D)(5)(a) and (c) of the American Bar Association Code of Professional Responsibility adopted by the Supreme Court of South Carolina:<sup>3</sup>

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with

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1. The full text of the amendment is set forth at J.S.A. 18a.

2. The full text of §4 of the rule is set forth at J.S.A. 18a-19a.

3. DR 2-103(D) is set out in full at J.S.A. 19a-21a. This subsection has been substantially rewritten by the American Bar Association but the change has not been adopted in South Carolina.

the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

\* \* \*

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

\* \* \*

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.



Disciplinary Rule 2-104(A)(5) of the American Bar Association Code of Professional Responsibility adopted by the Supreme Court of South Carolina:<sup>1</sup>

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

\* \* \*

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

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1. DR 2-104(A) is set out in full at J.S.A. 21a-22a.

### QUESTIONS PRESENTED

I. Whether the decision is in conflict with NAACP v. Button, 371 U.S. 415 (1963), and subsequent cases, which held that individual and collective activity to assure meaningful access to the courts is protected by the First Amendment unless the state demonstrates a compelling interest in support of the particular narrowly drawn regulation. Bates v. State Bar of Arizona, \_\_\_ U.S. \_\_\_, 97 S.Ct. 2691 (1977).

II. Whether appellant was denied due process of law in that she did not receive fair notice of the conduct charged, there was no evidence to support the rules found to be violated, and the disciplinary rules, as construed, are void for vagueness.

## STATEMENT

This is an appeal from a public reprimand administered to appellant Edna Smith, a member of the bar, by the Supreme Court of South Carolina on March 17, 1977.<sup>1</sup> The state court held she had violated Disciplinary Rules 2-103(D)(5)(a) and (c) and 2-104(A)(5) of the American Bar Association Code of Professional Responsibility (hereinafter ABA Code) by soliciting a client--not for herself--but for the American Civil Liberties Union. Appellant filed a notice of appeal and probable jurisdiction was noted by this Court on October 3, 1977, 46 LW 3179. J.S.A. 1a-14a, 27a.

In order to identify the issues that are, and are not, raised by this case, it will be necessary to review the facts developed below in some detail. At the outset, however, it should be noted that the following facts are established by

1. Complaints against bar members are heard initially by a three member panel of the Board of Commissioners on Grievances and Discipline. The panel makes a report to the full board. The board files a report with the Supreme Court in all cases in which it recommends a public reprimand, suspension or disbarment; the Supreme Court may also review dismissals or private reprimands pursuant to §34 (effective June 12, 1975), of the Rule on Disciplinary Procedure for Attorneys of the Supreme Court of South Carolina. Code of Laws of South Carolina, 1976, Vol. 22, p. 78.

uncontradicted evidence in the record:

(1) Appellant Edna Smith was invited by Gary Allen, a local businessman, to attend a meeting of poor, black Medicaid mothers to discuss their constitutional rights concerning forced or unwanted sterilization as a condition for continuing to receive Medicaid assistance.

(2) At that meeting, appellant met Mrs. Marietta Williams, who had undergone a sterilization operation.

(3) Thereafter, appellant was contacted by Allen, who told her that Mrs. Williams wanted a lawyer to represent her in a suit for damages against the doctor who had sterilized her, but was unwilling to write to appellant.

(4) After conferring with the South Carolina ACLU, appellant wrote to Mrs. Williams and told her the ACLU (not appellant or her associates) "would like to file a lawsuit on your behalf for money damages against the doctor who performed the operation".

(5) Mrs. Williams eventually decided not to sue. Accordingly, no lawsuit resulted from the letter in question, and appellant had no further contact with Mrs. Williams.

(6) There is no claim that appellant would have benefitted financially, or in any other way, from any suit by Mrs. Williams against her doctor.

#### Sterilization of Welfare Mothers

During the summer of 1973, local and national newspapers reported that certain pregnant mothers on welfare in Aiken County, South Carolina, most of whom were black, were being sterilized or threatened with sterilization as a condition for continuing to receive Medicaid assistance.<sup>1</sup> See, "3 Carolina Doctors Are Under Inquiry in Sterilization of Welfare Mothers," New York Times, July 22, 1973, p. 30.

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1. "Medicaid" is the designation of a federal-state program that provides payment for medical and hospital services rendered to persons who qualify as indigent. In South Carolina, eligibility is limited to those persons who are receiving welfare payments for subsistence.

Living in Aiken at that time was a local businessman named Gary Allen, who for several years had been active in community activities in Aiken County and South Carolina. App. 189-92. He was then president of the United Christian Workers, whose purposes included helping poor people receive public assistance and protecting welfare recipients against various forms of discrimination. App. 192.<sup>1</sup> Allen had known for many years some of the Medicaid patients who had been sterilized, and their families. App. 193. Because of that friendship and his concern with discrimination in the welfare system, he discussed with them on several occasions the lawfulness of sterilization as a condition for continuing to receive Medicaid benefits and whether the practice could be stopped. App. 193-94, 200-02.

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1. Allen, who had a prior criminal record, was also a member of the South Carolina Association for Improved Justice which helped indigent persons accused of crimes in receiving adequate assistance of counsel and other constitutional guarantees. App. 190-91, 197.



Following their discussions, Allen and the women decided to seek legal advice and assistance. App. 195-96, 201-02. Allen did not, however, believe that they could get help in Aiken. "[P]oor people ... just doesn't have the representation there in Aiken very much." App. 191.<sup>1</sup> Accordingly, he contacted Ed McSweeny, an employee of the South Carolina Council on Human Rights, a private, non-profit organization with offices in Columbia. App. 89-90, 194-95. One of the Council's projects was a continuing study of public assistance in South Carolina. App. 91. Allen asked that the Council send someone to Aiken to talk with the women involved in the sterilizations. App. 194-95. Appellant was at that time on retainer to the Council as a consultant and McSweeny asked her to respond to Allen's request for help. App. 89-90.

1. The three member panel which originally heard the complaint on March 20, 1975, sustained an objection to appellant's questions to Allen concerning the availability of legal assistance to indigents and minorities in Aiken as going into "an area that really isn't involved in this particular proceeding." App. 191-92. Counsel then made an offer of proof "that this witness would testify that it's difficult for minority people in Aiken County to secure representation particularly in unpopular causes where they have been aggrieved by members of the majority community." App. 192.

### Edna Smith

Edna Smith, a black woman, was admitted to the South Carolina Bar in September, 1972. Her father was a sharecropper in Yemassee, South Carolina, and her mother did domestic and custodial work. Using her own earnings and several scholarships, she completed an undergraduate degree from the University of South Carolina in 1966, and a law degree there in 1972. App. 83-5.

Throughout her adult life she has been active in social service and civic projects, both as a volunteer and as a paid employee. She has done voter education work, been a counselor in an Upward Bound program, is a charter member of the Greater Columbia Literacy Council (1969), helped establish a local day-care center, and since 1972 served as a cooperating attorney and member of the board of directors of the South Carolina ACLU.<sup>1</sup> She has taught courses in law at Columbia College, Allen University, and the extension division of the University of South Carolina, all in the City of Columbia. App. 86-8.

1. Board members and cooperating attorneys serve without compensation. Appellant has never even been reimbursed for out-of-pocket expenses incurred on behalf of the ACLU. App. 89.

After admission to the bar, she set up private practice with two others under the name Carolina Community Law Firm. Each member paid a pro-rata share of office expenses but each retained his or her own fees. The office later adopted stationery with the letterhead "Buhl, Smith and Bagby" but the practice of sharing expenses and retaining individual fees continued. One of the attorneys in the office, Herbert Buhl, was a part-time staff attorney for the South Carolina ACLU. App. 133-34, 144-47.

One of appellant's first clients was the South Carolina Council on Human Rights. Sometime during July, 1973, she was instructed by Ed McSweeney of the Council to contact Allen and arrange to meet with him and the Medicaid mothers involved in the sterilizations. She did as directed and Allen arranged a meeting for later in the month. App. 89-91, 107-08, 124-25. At that time, appellant did not know and had never met Allen or any of the Medicaid mothers. App. 90, 113, 116, 141.

### The Aiken Meeting

After talking with appellant, Allen notified the Medicaid mothers with whom he had been in contact of the meeting to be held in his office. A. 194-198. One of the women he notified was Marietta Williams, who had been sterilized by her doctor after the birth of her third child. App. 30, 40-1. Allen was an old friend, both of Mrs. Williams and her family. As Mrs. Williams acknowledged, "I had been knowing Mr. Allen -- see, my grandmother knowed all about him from childhood and I always have known him because he has been a friend of my family for years." App. 65.<sup>1</sup> Mrs. Williams came voluntarily to the meeting

1. According to Allen, Mrs. Williams "had been raising sand ... because she felt she had been mistreated by the doctor." App. 193. He testified that Mrs. Williams had specifically asked that "counsel ... come down and discuss this matter with her and ... see what could be done." App. 195. In spite of their admitted long-standing friendship, Mrs. Williams, the state's only witness, denied at the hearing that she had ever discussed her sterilization with Allen prior to being told of the July meeting and even denied that she had ever had "any discussion of any kind with Mr. Allen." App. 58, 65, 74. Mrs. Williams frequently contradicted herself throughout her testimony. App. 32, 42, 49-52, 62, 71. She enjoys the reputation in her community of being "today (Footnote continued to next page.)"

with her grandmother because she wanted "to see what it was all about." App. 41-2.<sup>1</sup>

At the meeting, appellant Smith met Mrs. Williams for the first time. App. 116. After Allen introduced her, she informed them that she was an attorney and then "talked to the ladies to find out ... what had happened ... and [answered] general questions about the sterilization itself." App. 91. She told the "group in general, and I might have told Mrs. Williams the same thing, that they had certain rights under the constitution." App. 109. She also discussed with Allen, in the presence of the group, the recourse the women might have if they felt they had been coerced into accepting sterilization. Ibid. But she did not tell any of the women directly that they could or should bring a lawsuit for money damages or any other kind of relief, nor did she offer to represent Mrs.

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(Footnote continued from preceding page.)  
... one way and tomorrow ... another way." App. 204. The lower court made no finding concerning the extent of contact between Allen and Mrs. Williams prior to his notifying her of the July meeting.

1. According to Mrs. Williams, Allen had told her they would discuss the possibility of suing the doctor who had performed her sterilization. App. 41.

Williams or anyone else present. App. 101, 110. As Allen put it, the purpose of the meeting was not to discuss litigation, but "just to kinda advise the girls of their rights and sit down and discuss the matter." App. 201.<sup>1</sup>

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1. Mrs. Williams' testimony was contradictory as to whether appellant offered to represent her, but she was emphatic that appellant never offered to represent her for a fee. App. 62-4. On four occasions, generally in response to leading questions, Mrs. Williams testified that appellant offered personally to represent her, but on five other occasions she denied -- or failed to assert -- that appellant offered to represent her. App. 32, 42, 49-52, 62, 71.

Both appellant and Allen denied that any offer of representation was made at the July meeting and the State did not offer the testimony of any other person to confirm Mrs. Williams' testimony, although others had been present at the meeting. In any case, the panel, which observed Mrs. Williams' demeanor, did not find that appellant had offered to represent Mrs. Williams, and the lower court concurred in that assessment. J.S.A. 6a, 16a.



### The Sterilization Law Suit

After the July meeting, Allen contacted appellant, by letter and telephone, and told her several of the women had decided to file a law suit against the doctor who had sterilized them, or threatened them with sterilization, and wished legal assistance. App. 94, 96-7. Appellant advised him to have the women request help from the ACLU. App. 97. Two of them did and the ACLU agreed to secure representation for them. A law suit was eventually filed against their doctor, Clovis Pierce, and several state officials, by lawyers associated with the ACLU. See, Doe v. Pierce, Civ. No. 74-475, D.S.C. (Exhibit C-2, App. 76).<sup>1</sup> Appellant and her associate Buhl, the part-time staff attorney for the ACLU, did not represent the plaintiffs in that litigation.<sup>2</sup> App. 107, 114.

1. One of the plaintiffs in Doe v. Pierce, supra, recovered a judgment against the doctor following a jury trial, but the court of appeals reversed on the ground that the requisite state action to maintain the suit was lacking. Walker v. Pierce, 560 F.2d 609 (4th Cir. 1977).

2. Carlton Bagby, the third attorney in her office, was one of several attorneys for plaintiffs in Doe. The state court erroneously found that Buhl was counsel in Doe. J.S.A. 3a.

Sometime during August, 1973, Allen contacted appellant again and told her that Mrs. Williams also wished to bring suit. Would appellant, he asked, write to her and let her know if the ACLU would get a lawyer to represent her in a damage action against her doctor? App. 94, 96-7, 99, 123, 196. Appellant was not surprised that Mrs. Williams had not written to her, for she had observed that Mrs. Williams had very little education. App. 99.

Appellant was informed that the board of directors of the state ACLU had agreed to furnish representation to the Aiken Medicaid mothers and accordingly wrote to Mrs. Williams on August 30, 1973, offering to her the assistance of the ACLU. App. 132-33, 135-37. It was that letter which the lower court found constituted unethical solicitation in violation of the ABA Code.<sup>1</sup> The evidence is not contradicted that Allen told appellant Mrs. Williams wished to bring suit and that appellant acted at his request in writing the letter, and with the knowledge of the apparent relationship between Allen and Mrs. Williams

1. Mrs. Williams conceded that she had at one time expressed a desire to sue her doctor, but denied that she had told this to Allen. App. 43-4, 57-8. According to appellant, she had said at the July meeting that her sterilization had been "forced." App. 105-6, 126.

and Mrs. Williams' statements that her sterilization had been involuntary. App. 115-16. The letter provides in relevant part:

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.  
J.S.A. 25a-26a.

Shortly after she received the August 30, 1973, letter, Mrs. Williams visited her doctor, later a defendant in Doe v. Pierce, supra. The purpose of the visit was to discuss the progress of her child, who was suffering from dehydration, and for post-partum examination. App. 30, 44, 60, 67. At the doctor's office she was met by the doctor and his attorney, B. Henderson Johnson. App. 44-5, 58, 70. Mrs. Williams had never been represented by Johnson or by any other attorney at that time. App. 58, 67-9. Johnson stated that he knew she had prior contact with appellant and wanted to know

whether she intended to sue Dr. Pierce. She answered that she did not and was asked to sign a release of liability in favor of the doctor. She signed the release and showed the August 30, 1973, letter to the doctor and lawyer. App. 49-52, 70, 100-01, 242-43. They retained a copy and allowed her to use the telephone to notify appellant of her intentions not to sue.<sup>1</sup> App. 51-2, 59-60, 69.

According to appellant, Mrs. Williams called her twice after receiving the August letter. During the first conversation she said that she had signed a release with Dr. Pierce and would not bring any action against him. "This was at the request of either her mother or her grandmother and Dr. Pierce." App. 100. Later that afternoon, Mrs. Williams called again "saying that she was thinking about the matter and was just wondering ... if maybe she could change her mind. She told me then that she ... could ... [not] go against ... her mother or grandmother." App. 100-01. That was the last contact appellant had with Mrs. Williams. App. 69.

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1. Mrs. Williams, in her affidavit, stated that she had been "directed" to call appellant from the doctor's office. App. 242-43.

### The Charge of Solicitation

The letter from appellant to Mrs. Williams, which forms the basis for the complaint in this case, was not referred to the Board of Commissioners on Grievances and Discipline until August 19, 1974, nearly one year after it came into the possession of Dr. Pierce's lawyer.<sup>1</sup> The letter, in fact, was referred to the board only after the complaint in Doe v. Pierce, supra, was filed and only after defense attorneys had used it in an unsuccessful attempt to get the complaint dismissed on the grounds that the case was barred or rendered unlawful because of solicitation.<sup>2</sup> When one of the plaintiffs in Doe v. Pierce, supra, was deposed concerning solicitation, United State District Judge Sol Blatt, Jr. ruled

1. The letter was sent to the board by A. Camden Lewis, an Assistant Attorney General of South Carolina, who represented certain defendants in Doe v. Pierce, supra, and who has been an attorney of record in this case. App. 24. The letter was in the Attorney General's possession prior to April 29, 1974, at which time it was produced at a deposition of Eldon Wedlock, Associate Professor at the University of South Carolina Law School and then President of the South Carolina ACLU. (Exhibit R-2, p. 16, et seq., App. 206.)

2. See transcript excerpt of May 10, 1974, hearing in that case. App. 252-57.

that "the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACL[U], in contacting if that in fact did happen, the plaintiffs ..." App. 248. (Exhibit R-3, App. 206.) The favorable ruling of Judge Blatt was never forwarded to the board or brought to its attention by any of the defense lawyers in Doe v. Pierce, supra, or attorneys in the State Attorney General's office.

The secretary of the board filed the complaint against appellant on October 9, 1974, charging that she had committed "solicitation in violation of the Canons of Ethics" by writing the August letter to Mrs. Williams. J.S.A. 23a-36a. In 1973, the Supreme Court of South Carolina had repealed the Canons of Professional Ethics referred to in the complaint and had adopted, instead, the ABA Code. The complaint, however, did not mention the ABA Code, and did not specify which disciplinary rule or rules were allegedly violated.

In her Answer filed on October 31, 1974, and Amended and Supplemental Answer filed on March 12, 1975, appellant denied that she had committed "solicitation" and asserted inter alia that her conduct was



protected by the First and Fourteenth Amendments of the Constitution and by Canon 2 of the ABA Code, that the Rule on Disciplinary Procedure of the Supreme Court of South Carolina pursuant to which the complaint was filed was vague and overbroad, and that the complaint was in retaliation against her because of her race, sex, and associational activities with the ACLU. App. 5-20.<sup>1</sup>

#### The Hearing

The complaint was heard by the panel of the board on March 20, 1975. The state's evidence consisted solely of the letter, the testimony of Mrs. Williams and copies of the summons and complaint in Doe v. Pierce, supra. At the close of the state's case, appellant moved to dismiss on the grounds that the

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1. Appellant attempted to enjoin the disciplinary proceedings by filing an action in the federal district court. The complaint was dismissed on grounds of Younger v. Harris, 401 U.S. 37 (1971), without reaching the merits and the dismissal was affirmed on appeal. American Civil Liberties Union v. Bozardt, 539 F.2d 340 (4th Cir. 1976). Three judges dissented from denial of a petition for rehearing en banc in an unreported opinion set out at J.S.A. 28a-34a. Review was denied by this Court, \_\_\_ U.S. \_\_\_, 97 S.Ct. 639 (1976).

complaint failed to allege a violation of any disciplinary rule and that there was no evidence of "solicitation." App. 77-80. The motion was denied. App. 82.

Appellant offered to show through expert testimony the difficulty of obtaining representation in unpopular cases and the effect of disciplinary proceedings upon attorneys who have tried to assist in providing representation for unpopular clients. App. 164. Appellant also offered to show that such disciplinary proceedings, regardless of their merit, diminish the availability of legal service and information to the general public, particularly to the underprivileged. App. 165-66.

Appellant next offered to show that, unless members of the bar take the initiative and make available to aggrieved persons information about their legal rights and about the availability of legal counsel from organizations such as the ACLU, constitutional and other legal rights will not be vindicated. App. 167. The panel ruled that such evidence was "beyond the scope of this particular inquiry." App. 168.

The panel also refused to permit opinion evidence from Professor Daniel H. Pollitt of the University of North Carolina School of Law, who was qualified as an expert in constitutional law, whether appellant's conduct was constitutionally protected or whether she had committed solicitation. App. 168-69.

Through testimony of another witness, Charles Lambeth, a former member of the National Board of Directors of the ACLU, appellant sought to establish that the ACLU was in the nature of a legal aid or public defender office, that it was a legitimate non-profit organization, and that one of its purposes was to educate laypeople about their rights and remedies and to make counsel available to them. App. 183-84. The panel first ruled that the purposes and method of operation of the ACLU were irrelevant. "The Panel really doesn't see that the purpose of that organization is an issue in this lawsuit at all, we are not trying this organization." App. 184. Then the following exchange occurred:

MR. McDONALD: ... this witness would testify that the ACLU is in the nature of a legal aid or public defender office, and that it is operated and sponsored by a legitimate non-profit organization. And that one of its purposes is to educate layman [sic] as to their rights and their remedies and to make counsel available to them.

[PANEL CHAIRMAN]: Is there any question in your mind that that's the purpose? I don't know what relevance it has. Isn't this a matter that there isn't any dispute about?

MR. KALE: I don't have any dispute about it.

App. 185.

Then, the panel ruled that "we could shorten this ... by simply stipulating ... that this is what the American Civil Liberties Union is, this is its purpose and this is what it does." App. 185-6.<sup>1</sup>

1. The ACLU is a national organization of more than a quarter million members located in 49 state-wide affiliates and 379 local chapters. Since its inception in 1920 its sole purpose has been defense of the Constitution and its Bill of Rights. The ACLU's program consists of legislative reform, education and litigation in the public interest. The goal of ACLU litigation, in general terms, is to advance understanding and acceptance of civil liberties principles. Policy #513, 1976 Policy Guide of the (Footnote continued to next page.)

Appellant then offered to show by testimony of the same witness that because of the activity of the ACLU, individuals have, with greater frequency, been able to seek redress of constitutional violations. Again, the panel ruled the evidence was not "germane." App. 186. The panel also found irrelevant appellant's proffered evidence that the ACLU considered its activities constitutionally protected. App. 187-88.

The panel filed a report recommending the appellant be found guilty of soliciting a client on behalf of the ACLU, not on behalf of herself. The panel recommended a private reprimand as discipline, noting that it was "impressed by the fact that the respondent's activities were neither

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(Footnote continued from preceding page.)

American Civil Liberties Union. Clients are never charged any fee.

aggravated nor widespread .... The violation ... is isolated to one particular class action." J.S.A. 17a.<sup>1</sup> After a hearing on January 9, 1976, the board approved the panel report and administered a private reprimand. J.S.A. 1a.

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1. At the hearing before the panel, several members of the Columbia bar, all of whom had known appellant for several years prior to 1973, testified that her reputation as a member of the bar, her reputation for truth and veracity, and her reputation for ethical practices at the bar were "outstanding," "excellent," "very good." App. 150, 153-55. One of them testified that appellant "adheres to the highest ethical practices the profession could expect." He also offered to testify that he personally knew of litigation in which he had been retained as counsel that appellant had had an opportunity to steer to herself for compensation but, instead, had chosen to assist him in the litigation without compensation. App. 150-51.



### The Court Below

Appellant petitioned the Supreme Court of South Carolina to review and expunge the private reprimand. Review was granted. There was no cross-petition seeking an increased penalty, yet on March 17, 1977, the state court entered its order adopting the panel report and, sua sponte, increasing the discipline administered from a private reprimand to a public reprimand. J.S.A. 1a-14a.

The basis for the public reprimand was stated as follows:

The evidence is inconclusive as to whether the respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages.<sup>1</sup>  
J.S.A. 6a.

1. There was no evidence to support any implication that the ACLU would have received part of a damage award recovery by Mrs. Williams. The ACLU and its state affiliates never take or accept even one penny of any damage award to a plaintiff they have represented. One of the plaintiffs in Doe v. Pierce, supra, did recover judgment in the amount of \$5, but the award was vacated by the court of appeals.  
(Footnote continued to next page.)

Appellant was held to have violated two disciplinary rules:

(1) DR 2-103(D)(5)(a) and (c), which, by its terms, solely prohibits an attorney from "knowingly assist[ing] a person or organization ... to promote the use of his services or those of his partners or associates." There was no finding that appellant or the ACLU ever promoted the use of her own professional services, or those of her associates.

(2) DR 2-104(A)(5), which, by its terms, states that an attorney who has given unsolicited advice "shall not accept employment resulting from that advice." There was never even any claim that appellant or anyone else accepted employment by Mrs. Williams.

(Footnote continued from preceding page.)  
Walker v. Pierce, supra. The only way the ACLU could possibly benefit financially would be by recovery of a court award of costs or attorney's fees. Because of the panel's declared disinterest in the ACLU, no detailed evidence concerning attorney's fees awards was offered. The only evidence in the record concerning attorney's fees is that such awards, if any had been received, constituted an insignificant portion of the budget of the North Carolina affiliate.  
App. 182-83.

# SUMMARY OF ARGUMENT

## I

Appellant offered free legal assistance of the American Civil Liberties Union to an indigent woman of limited education whom appellant had previously met and understood had been forced to submit to sterilization as a condition for receiving Medicaid benefits. The offer was made without any hope or possibility of personal financial gain. The offer was made many weeks after the sterilization had occurred and was in the form of a letter written at the specific request of one of the woman's friends and a community organization appellant knew to be acting on her behalf. Appellant's conduct, under the circumstances, was speech and associational activity protected by the First Amendment. NAACP v. Button, 371 U.S. 415 (1963); Bates v. State Bar of Arizona, \_\_\_ U.S. \_\_\_, 97 S.Ct. 2691 (1977).

The state did not identify or advance, nor did the lower court find, any state interest to justify punishment of appellant for her First Amendment activity. That fact alone requires reversal. Sherbert v. Verner, 374 U.S. 398, 407 (1963). To the

extent that there are any conceivable state interests justifying regulation of offers of legal assistance, such interests may be achieved by more narrowly drawn regulations than those adopted by the state court. Wooley v. Maynard, \_\_\_ U.S. \_\_\_, 97 S.Ct. 1428, 1436 (1977); NAACP, supra, 371 U.S. at 433.

Two conceivable state interests involved -- the "dignity of the profession" and strains on disciplinary enforcement -- have already been definitively rejected by this Court in Bates, supra, 97 S.Ct. at 2704, n. 30 and 2706-07. Other conceivable interests -- prohibiting overreaching and misrepresentation -- are not relevant to the facts of this case and can be achieved by more narrow regulation. Bates, supra, 97 S.Ct. at 2704, n. 31 and 2708. The contact in this case, a letter written at the request of a disinterested third party, was wholly unobtrusive and did not occur in any situation that "breeds undue influence." Bates, supra, 97 S.Ct. at 2700. A prohibition of fraud and deception is the constitutionally appropriate remedy, not a total ban on offers of service. Bates,

supra, 97 S.Ct. at 2704, n. 31 and 2708.

The concern for "stirring up" litigation does not apply in this case since there is no evidence that appellant acted maliciously. NAACP v. Button, supra, 371 U.S. at 439-40. The state had more narrow regulations to proscribe malicious and oppressive litigation, regulations that were never invoked in this case. DR 7-102(A)(1) and (2); DR 7-105(A). Bates, supra, 97 S.Ct. at 2705.

Offering free legal assistance to those in need is consistent with the highest traditions of the bar and Canon 2 of the American Bar Association Code of Professional Responsibility. The vindication of constitutional rights through litigation has always been regarded as a different matter from the oppressive or avaricious use of legal process for private gain. NAACP v. Button, supra, 371 U.S. at 443.

Bar disciplinary proceedings, being "quasi-criminal" in nature, require that the person charged with misconduct be given fair notice of the precise charges, In re Ruffalo, 390 U.S. 544, 550-51 (1968), and the specific issues to be met. In re Gault, 387 U.S. 1, 34 and n. 54 (1967). The complaint in this matter, however, alleged only "solicitation in violation of the Canons of Ethics." App. 2. Appellant was given no notice of the disciplinary rule(s) allegedly violated nor the elements of the offense(s) charged. Only after the panel issued its report did she learn how her conduct was thought to violate the law. This procedure denied her fair notice and due process.

Further, there was no proof nor finding of numerous elements of the disciplinary rules. The absence of proof of essential elements of the offenses also violated due process. Thompson v. City of Louisville, 362 U.S. 199 (1960).



The state court read the disciplinary rules expansively, rather than narrowly. The court did not ask whether the rules prohibited appellant's conduct, but rather whether the rules expressly permitted it; finding no express authorization, the rules were held to proscribe the writing of the letter. The resulting construction retroactively proscribed appellant's conduct, and made the rules, as applied to her, fatally vague. Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

# ARGUMENT

## I. INDIVIDUAL AND COLLECTIVE ACTIVITY TO ASSURE MEANINGFUL ACCESS TO THE COURTS FOR VINDICATION OF CONSTITUTIONAL RIGHTS IS PROTECTED BY THE FIRST AMENDMENT. ACCORDINGLY, APPELLANT'S LETTER, AND HER COMMUNICATIONS AND ACTIVITIES PRECEDING THE LETTER, WERE CONSTITUTIONALLY PROTECTED.

Prior decisions of the Court show that appellant's communication and activities were presumptively protected by the First Amendment, and thus not subject to state regulation or sanction, absent a compelling state interest.<sup>1</sup>

In NAACP v. Button, 371 U.S. 415, 421, 429 (1963), the Court held that individual attorneys could attend meetings of prospective clients, urge and persuade persons in attendance to bring lawsuits, and then represent them (which was not done or offered in this case), and that those activities were protected as "a form of political expression."

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1. Appellant will show infra, Point II, that the state did not advance or prove any compelling state interest, and that the court below did not identify any compelling state interest that justified disciplinary sanctions in the circumstances of this case.

The Court rejected the state's argument that "solicitation" was "wholly outside the area of freedoms protected by the First Amendment." 371 U.S. at 429.

[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. [Citations of authority omitted.] In the context of the NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.<sup>1</sup>  
Id.

In three cases since Button, the Court has expanded the scope of that decision and has made clear that individual and collective activity to assure meaningful access to the courts is a constitutionally protected

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1. The Court then cited with approval an ACLU Report and a Comment, "Private Attorneys-General: Group Action in the Fight for Civil Liberties," 58 Yale L.J. 574 (1949), which discussed the similar litigation activities of the ACLU. 371 U.S. at 429, n. 12, and 440, n. 19.

right, no matter what legal issue is sought to be litigated. Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964) (FELA claims); United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967) (workmen's compensation claims prosecuted by a retained staff attorney); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971) (FELA claims). In the last cited case, the Court criticized the state court for "[giving] our holding in Trainmen the narrowest possible reading", 401 U.S. at 579-80. And last term, the Court reaffirmed this principle in Bates v. State Bar of Arizona, \_\_\_ U.S. \_\_\_, 97 S.Ct. 2691, 2705, n. 32 (1977):

The Court often has recognized that collective activity undertaken to obtain meaningful access to the courts is protected under the First Amendment. [Citations of authority omitted.] It would be difficult to understand these cases if a lawsuit were somehow viewed as an evil in itself. Underlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them.<sup>1</sup>

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1. The record in this case contains an uncontradicted offer of proof that access to the courts for the protection of civil (Footnote continued to next page.)

Accordingly, the "collective activity" undertaken by Gary Allen, the South Carolina Council on Human Rights, and appellant, all of which was designed to provide poor, black

(Footnote continued from preceding page.)

liberties can be meaningfully assured, in many instances, only by affirmative offers of legal assistance to aggrieved parties. App. 167. Cf. The opinion of the Supreme Court of Appeals of Virginia reviewed in Button, sub nom. NAACP v. Harrison, 202 Va. 142, 116 S.E.2d 55, 63 (1960):

Only one witness, out of some twenty-four litigants in school cases, testified that he would have instituted legal proceedings if the NAACP had not agreed to finance them.

As Ethical Consideration 2-1 of Canon 2 of the ABA Code (which also contains the disciplinary rules which appellant allegedly violated) expressly notes, "important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." "The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed." EC 2-2.

women who had been "aggrieved" by unwanted sterilization with "information regarding their legal rights and the means of effectuating them," was precisely the type of activities held to be constitutionally protected in Bates, Button and other decisions of this Court.

Furthermore, although the collective activities involved in this case are similar to the collective activity involved in Button, and are therefore "a form of political expression,"<sup>1</sup> it is now clear from this Court's more recent decisions that speech is protected, even though it advises potential clients through advertising of the availability and cost of legal services to be provided by the advertiser. Bates v. State Bar of Arizona, supra. The speech in this case was to facilitate informed decisionmaking by women whether they would be sterilized, and to promote

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1. The court below sought quite incorrectly to distinguish Button on the basis that the NAACP was considered a political organization, J.S.A. 13a.



equal treatment of welfare recipients. Unquestionably, such speech advanced "individual and societal interests" and is protected. Bates, supra, 97 S.Ct. at 2699.

The First Amendment does not permit the state to prohibit speech simply because of its content, if that content does not constitute a crime, e.g., extortion or obscenity. Cf. Tinker v. Des Moines Community School District, 393 U.S. 503, 510-11 (1969). Appellant's offer of the assistance of the ACLU was pure speech. As in Bridges v. California, 314 U.S. 252, 275-8 (1941), this case involves "a pure form of expression" indistinguishable from the telegram in Bridges. Cox v. Louisiana, 379 U.S. 559, 564 (1965). When speech is accompanied by conduct, the conduct may be regulated, just as those who use the public ways for pure speech are subject to regulation of the place, time, and manner of their speech activities. See, Cox v. Louisiana, 379 U.S. 536, 558 (1965); Adderly v. Florida, 385 U.S. 39, 47-8, and ns. 6 and 7 (1966). Cf. Bates v. State Bar of Arizona, supra, 97 S.Ct. at 2718, n. 12 (Powell, J., dissenting). But there can be no justification for an absolute ban on offers of free legal assistance.

## II. THE ABRIDGMENT OF APPELLANT'S FIRST AMENDMENT RIGHTS, IN THE CIRCUMSTANCES OF THIS CASE, WAS NOT JUSTIFIED BY A COMPELLING STATE INTEREST AND IS OVERBROAD.

In order to regulate or punish communications and activities protected by the First Amendment, the state must meet the affirmative burden of proving that the regulation is "necessary" to achieve a "compelling" and "legitimate" state interest; and the state's asserted justification must be subjected to "strict" and "close" judicial scrutiny. NAACP v. Button, 371 U.S. 415, 433, 438-39 (1963); NAACP v. Alabama, 357 U.S. 449 (1958); Buckley v. Valeo, 424 U.S. 1, 25 (1976). See also, Bates v. Little Rock, 361 U.S. 516, 524 (1960); Abood v. Detroit Board of Education, \_\_\_ U.S. \_\_\_, 97 S.Ct. 1782, 1812 (1977); Elrod v. Burns, 427 U.S. 347 (1976); Cousins v. Wigoda, 419 U.S. 477, 489 (1975); Healy v. James, 408 U.S. 169 (1972); Baird v. State Bar of Arizona, 401 U.S. 1 (1971); In re Stolar, 401 U.S. 23 (1971); Williams v. Rhodes, 393 U.S. 23 (1968); Schneider v. Smith, 390 U.S. 17 (1968); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

Even if appellant's conduct could constitutionally be punished under a properly drawn rule, the disciplinary rules as construed are overbroad, because they "sweep within [their] ambit protected speech or expression." Doran v. Salem Inn, Inc., 442 U.S. 922, 933 (1975); Wooley v. Maynard, \_\_\_ U.S. \_\_\_, 95 S.Ct. 1428, 1436 (1977); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975); Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Gooding v. Wilson, 405 U.S. 518, 522 (1972). Free speech is fundamental in a free society. As this Court noted in Bates, supra, 97 S.Ct. at 2707:

[A]n overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute. See NAACP v. Button, 371 U.S. 415, 433 (1963). Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged.

Appellant's First Amendment rights were also violated because of the vagueness of the rules applied, Grayned v. City of Rockford, supra, 408 U.S. at 114, since the uncertain meanings will lead citizens to "steer far wider of the unlawful zone" than a constitutionally valid rule could require. Speiser v. Randall, 357 U.S. 513, 526 (1958). The particular aspects of vagueness are discussed, infra, Point III.

A. The Record In This Case Shows That The State Did Not Advance, And The Court Below Did Not Find, A Compelling State Interest.

The state did not even attempt to advance a "compelling" interest that made "necessary" the regulation and punishment of appellant's First Amendment activity, and the court below did not find any such interest. Indeed, the court below did not even attempt to identify conceivable state interests the state might have advanced. Thus, the state utterly failed to meet its burden to demonstrate a necessary and compelling state interest, and the court below erred in failing to subject the state's regulation of appellant's First Amendment activity to close and strict judicial scrutiny. Such failures alone require reversal. Sherbert v. Verner, 374 U.S. 398, 407 (1963):

[W]e are unwilling to assess the importance of an asserted state interest without the views of the state court.

B. In The Circumstances of This Case, The Conceivable State Interests Which Are Advanced By The State Would Not Justify Regulation and Punishment of Appellant's Communications and Activities.

The state's conceivable interests are identified, for the first time, in the Motion to Dismiss or Affirm, pp. 9-10, where the state describes the following "dangers" of allowing attorneys to "attempt to induce or pressure" potential litigants to bring suit:

The dangers in allowing such conduct ... include overreaching, misrepresentation, stirring-up litigation, preserving the dignity of the profession, and adversely effecting [sic] disciplinary enforcement (footnotes omitted).

These "dangers" have no application here, since Mrs. Williams, the prospective litigant, specifically testified that "Edna Smith did not attempt to persuade or pressure me to file this lawsuit." App. 52. Nevertheless, because they are the only conceivable justifications offered by the state, they will be discussed. In general, the state's conceivable justifications

mirror quite closely the justifications rejected by the Court in Bates v. State Bar of Arizona, \_\_\_ U.S. \_\_\_, 97 S.Ct. 2691, 2701-07 (1977). Furthermore, to the extent any of these justifications may be legitimate, they may be achieved by more narrowly drawn regulations that do not abridge First Amendment rights. See Wooley v. Maynard, \_\_\_ U.S. \_\_\_, 97 S.Ct. 1428, 1436 (1977) ("The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose."), United Transportation Union v. Michigan, 401 U.S. 576, 581 (1971); NAACP v. Button, supra, 371 U.S. at 433.

1. "Overreaching."

The state defines "overreaching" as "approaching clients at times when the clients are in no condition to properly consider retention of a lawyer." Motion to Dismiss or Affirm, p. 9, n. 14. The first time appellant spoke to Mrs. Williams was at a meeting Mrs. Williams voluntarily attended, knowing its purpose, "[t]o see what it was all about." App. 41. Thereafter, appellant wrote a letter to Mrs. Williams. It is difficult to conceive of



two less intrusive contacts: neither occurred "at the hospital room or the accident site, or in any other situation that breeds undue influence." Bates v. State Bar of Arizona, supra, 97 S.Ct. at 2700.<sup>1</sup>

The proper remedy for "overreaching" would be to regulate the place, time and/or manner of contacts, not to ban, absolutely, all offers of assistance.

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1. Although appellant did not meet Mrs. Williams "at the hospital room," another lawyer did. B. Henderson Johnson, a local Aiken lawyer, met Mrs. Williams at her doctor's office, and at a time when she was distracted by the serious illness of her child. Even though Mrs. Williams was unrepresented and Johnson knew she had an adverse interest and a potential claim against his client, the doctor, he secured from her a formal release of liability in favor of his client. App. 50, 100-01, 243. Apparently the state does not consider that contact to be "overreaching," because no disciplinary proceeding, to appellant's knowledge, has been brought against that lawyer. See, DR 7-104(A)(2).

## 2. "Misrepresentation."

In a proper case, preventing misrepresentation would be a legitimate state interest, perhaps even a compelling one. Bates, supra, 97 S.Ct. at 2706. But there is no evidence or allegation that appellant misrepresented anything to anyone. Furthermore, the prohibition of fraud and deception by narrowly drawn rules is the constitutionally appropriate remedy, not a total ban on offers of services. Bates, supra, 97 S.Ct. at 2704, n. 31, 2708.

## 3. "Preserving Dignity of the Legal Profession."

The state argues that offers of legal assistance undermine the dignity of the profession by reducing the bar's reliance on good reputation. Motion to Dismiss or Affirm, p. 9, n. 16. As the Court noted in Bates, supra, 97 S.Ct. at 2704, n. 30, this is an extremely speculative argument. The Court in Bates thought this argument was not sufficiently compelling to justify regulation of advertising; nor would it justify regulation of appellant's communication.

4. "Adverse Effects on Disciplinary Enforcement."

The state's argument on this point is unclear. The state's argument in Bates, rejected by this Court, was that it would be virtually impossible to enforce strictures against deceptive or misleading claims in advertisements because of the nature of the legal profession. But no such deception is alleged here. Nor is deception likely when legal services are offered without charge to the client. If possible deception in commercial advertising does not pose a sufficient threat to disciplinary enforcement to justify a prohibition of such ads, it follows that the much smaller likelihood of deception in the limited area of offers of free legal services does not sufficiently threaten disciplinary mechanisms to justify a prohibition of such offers. Bates, supra, 97 S.Ct. at 2706-07.

5. "Stirring Up Litigation."

The final interest asserted by the state is the state's interest in preventing attorneys from "stirring up litigation."

But as the Court noted in Bates, "'it is seen that the State's protectiveness of its citizens rests in large part on the advantages of their being kept in ignorance.'" Bates, supra, 97 S.Ct. at 2699, quoting from Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 769 (1976). Thus, insofar as this interest is asserted simply to protect the state or its agents from legitimate claims, it is not a legitimate or compelling state interest.

Furthermore, as the Court ruled in NAACP v. Button, supra, 371 U.S. at 439-40:

Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against governments in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law,<sup>1</sup> cannot be deemed malicious.

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1. See, to the same effect, Bates, supra, 97 S.Ct. at 2705:

Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better to suffer a wrong silently than to redress it by legal action.

Finally, the state court has adopted other, more narrowly applicable rules, to deal specifically with malicious and oppressive litigation.<sup>1</sup> See DR 7-102(A)(1) and (2); DR 7-105(A).

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1. Appellant contended in the lower court that the charges were brought against her not to protect any legitimate state interest, but in retaliation for a law suit brought against the practice of sterilization of Medicaid mothers. The evidence of retaliation included the facts that: (1) appellant's letter to Mrs. Williams was not sent to the board until nearly a year after it was written; and (2) only after attempts to use it as a defense in the sterilization case had been unsuccessful; and (3) the favorable ruling of Judge Blatt that no solicitation had occurred was never forwarded to the board nor brought to its attention. Appellant argued that even misconduct could not be used as a pretext for punishment for reasons other than the misconduct, relying upon *United States v. McLeod*, 385 F.2d 734, 744 (5th Cir. 1967), and *Lenske v. United States*, 383 F.2d 20, 27-8 (9th Cir. 1967). Whether or not retaliation was proven or is a defense, that evidence shows that the state did not consider its interest to require the prompt initiation of disciplinary proceedings, and shows that a federal judge did not find the state's interest to be legitimate or compelling.

C. In the Circumstances of This Case, No Other State Interest Would Justify Regulation And Punishment of Appellant's Communications and Activities, All of Which Were Consistent With the Highest Traditions of Legal Service.<sup>1</sup>

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Offering free legal assistance to those in need is entirely consistent with the highest traditions of the bar.<sup>2</sup> From the

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1. The state does not argue any interest it may have in regulating the practice of law by a lay entity. See *NAACP v. Button*, supra, 371 U.S. at 447 (concurring and dissenting opinion of Mr. Justice White). That conceivable interest is not applicable in this case because ACLU's long standing policy expressly recognizes that "[i]n any case where the ACLU or an affiliate has undertaken to furnish direct representation, the judgment of the attorneys who provide such representation must be governed by the client's interest, not the organization's, since they are acting as attorneys for the client, and not for the ACLU." Policy #513, 1976 Policy Guide of the American Civil Liberties Union. That policy reflects the ACLU's commitment to insuring that lawyers associated with the ACLU act only in the highest traditions of legal service and that is what happened in this case.

2. As noted supra, Canon 2 of the ABA Code directs each member of the bar to assist the legal profession in fulfilling its duty to make legal counsel available. The Code recognizes, however, that legal problems "may not be self-revealing and often (Footnote continued to next page.)



earliest times it has been a self-imposed duty of the profession to represent the poor and disadvantaged, whether in criminal or civil proceedings.<sup>1</sup> In recognition of this fact, the President of the American Bar Association and the Chairperson of the ABA Standing Committee on Legal Aid and Indigent Defendants are ex officio members of the Board of Directors of the National Legal Aid and Defender Association (the ACLU is a member of NLADA). Nearly every lawyer at one

(Footnote continued from preceding page.)

are not timely noticed." EC2-2. As a result, lawyers are encouraged to "educate laymen to recognize their problems," EC2-1, and may act properly "in volunteering advice to a layman to seek legal services." EC2-3. Unsolicited advice is proper "if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations." Ibid. And having volunteered advice, a lawyer continues to act properly if he or she "facilitate[s] the process of intelligent selection of lawyers, and ... assist[s] in making legal services fully available." EC2-1.

1. H. Cohen, History of the English Bar and Attornatus to 1450, 1929, p. 119; H. Drinker, Legal Ethics, 1953, pp. 62-63.

time or another has given free legal advice and assistance to someone in need. That has been particularly true of those who have distinguished themselves most before the bar and made the greatest contributions to American democracy and jurisprudence.

In 1804, Alexander Hamilton appeared "gratuitously for the defendant [in Croswell v. The People in New York], as affecting very essentially the constitutional right of trial by jury in criminal cases, and the American doctrine of liberty of the press."<sup>1</sup> President Abraham Lincoln, while an Illinois practitioner, often offered his services "to people who had suffered injustice and were unable to pay."<sup>2</sup>

1. Great American Lawyers, W. Lewis ed., 1907, Vol. I, p. 374.

2. Id., Vol. V, pp. 477-78. Joseph Jefferson, an actor, told a story of how, when his father's theatre company was faced with having to close because of a prohibitive license fee, Lincoln

called on the managers and offered, if they would place the matter in his hands, to have the license revoked, declaring that he only desired to see fair play, and would accept no fee whether he failed or succeeded. The young lawyer handled the case with tact, skill, and humor, in his argument tracing

(Footnote continued to next page.)

Clarence Darrow offered to represent John Scopes without fee after Scopes was indicted in 1925 for teaching the theory of evolution to public school children in Rhea County, Tennessee.<sup>1</sup> At the same time, William Jennings Bryan made it known through the newspapers that he would like to prosecute Scopes for the state, and his offer was accepted.<sup>2</sup> The common theme of these examples is summarized in NAACP v. Button, supra, 371 U.S. at 443: offering legal assistance "to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private

(Footnote continued from preceding page.)

the history of the drama from the time when Thespis acted in a cart to the stage of to-day. He illustrated his speech with pointed anecdotes which kept the City Council in a roar of laughter. "This good-humor prevailed," relates the famous actor "and the exhibition tax was taken off."

Id.

1. L. de Camp, The Great Monkey Trial, 1968, p. 96.

2. Id., p. 72-3. Other major examples include  
(Footnote continued to next page.)

gain."<sup>1</sup> Appellant's actions in informing Mrs. Williams of her legal rights, and later, at the request of Mr. Allen, offering to her the free legal assistance of the ACLU, were entirely consistent with the highest traditions of the bar. Appellant performed an essential public service, for no personal gain.

(Footnote continued from preceding page.)

Reverdy Johnson, formerly an Attorney General of the United States, offering his services in Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), V. Hopkins, Dred Scott's Case, 1971, p. 166, the trial of Mrs. Surratt for complicity in the murder of Lincoln, and, Ex Parte Garland, 71 U.S. (4 Wall.) 366 (1867); and James Louis Petigru, a leading member of the South Carolina bar, representing suspected abolitionists and free blacks seized as slaves. Lewis, supra, Vol. IV, pp. 41, 424, 438-39.

1. Every South Carolina decision finding "solicitation," with the exception of this one, has included the element, totally absent here, of personal gain. In re Craven, 267 S.C. 33, 225 S.E.2d 861, 863 (1976) ("their system of operation was ... designed to ... attract business."); In re Bloom, 265 S.C. 86, 217 S.E.2d 143, 145 (1975) (attorney reprimanded for making cash payments to police officers "to funnel him business."); In re Hartzog, 257 S.C. 84, 184 S.E.2d 116, 117 (1971) (attorney disciplined for "obtaining employment [and] ... charging a grossly excessive fee."); In re Crosby, 256 S.C. 325, 183 S.E.2d 289 (1971) ("this plan ... was ... profitable to respondent.") Ex parte Finley, 93 S.C. 37, 81 S.E. 279, 282 (1914) (attorney disciplined for "soliciting business.") App. 21-4.

It is easy to see that poor and disadvantaged citizens would have a compelling and vital interest in permitting such activities, and equally difficult to see how their government would have any legitimate interest in suppression of such activities.<sup>1</sup>

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1. The state court ruling not only burdens access to legal services for the poor, near-poor and unknowledgeable, but creates disillusionment with the bar because of failure to serve the public. Bates, supra, 97 S.Ct. at 2702, 2705.

D. No Compelling State Interest is Served by Denying to the ACLU and Attorneys Associated Therewith The Exemptions Available to Similarly Situated Organizations and Attorneys.

As we will show in Point III, infra, the court below found that appellant's activities did not come within the exceptions to the disciplinary rules, and then treated that finding as the equivalent of a violation of the rules to which the exceptions applied, even though there was no direct proof of violation of the rules. That ruling violated appellant's due process right to fair notice. As we will show in this point, however, denying appellant the availability of those exceptions serves no compelling state interest.

The court below construed the disciplinary rules essentially as prohibiting (1) seeking of employment from members of a class, and (2) cooperating with the litigation activities of any organization that either (a) as as a "principal purpose" the providing of legal services, or (b) ever prays for court-awarded attorneys' fees as costs. These restrictions are not



related to any conceivable state interest, nor is there any basis for such an application of the rules either in the ABA Draft of the Code of Professional Responsibility, or the prior decisions of this and other courts.

#### 1. Seeking Employment in Class Actions.

The lower court held that a lawyer may never "seek" employment in litigation in the nature of a class action. J.S.A. 9a. But that is precisely what was done by attorneys associated with the NAACP in school desegregation cases, and such conduct was held in NAACP v. Button, supra, to be a form of association and speech protected by the First Amendment.

If the ACLU may freely offer its legal services to individuals, as the state's positions (but not the decision below) have implied, there is obviously no compelling justification to prohibit the offering of services to individuals who happen to be similarly situated to other individuals. So long as all recoveries go to the class members, App. 183, as required by ACLU policy, concerns about the bringing of class actions to obtain large attorneys' fees from a fund recovered are wholly inapplicable.

#### 2. Providing Legal Services.

The ACLU was held not to be an excepted organization with which appellant could ethically cooperate because it had "the primary purpose of ... rendition of legal services." DR 2-103(D)(5)(a). J.S.A. 10a-11a. But the purposes of the ACLU in providing legal services are not distinguishable from those of the NAACP, which have been held constitutionally protected. NAACP v. Button, supra. There is no compelling state interest that would justify denial to the ACLU of the exempt status granted the NAACP. In Button, supra, 371 U.S. at 419-20, the NAACP's aims and methods were described as follows:

to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. To this end the Association engages in extensive educational and lobbying activities. It also devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation on behalf of its declared purposes.

Similarly, the ACLU has an education program, and lobbyists, App. 6, 177, as well as an

extensive program of litigation on behalf of civil liberties. It is not an organization designed solely to provide litigation services, but it does provide such services in the furtherance of "its declared purpose" to advance and defend the cause of civil liberties. The litigation activities of the ACLU and attorneys associated with it should therefore be entitled to the same constitutional protection afforded in Button.

The facts of this case particularly emphasize the absence of any substantial state interest to justify a ban on offers of assistance from organizations which provide legal services. The initial concern over coerced sterilizations in Aiken was voiced by Gary Allen on behalf of a local community group called United Christian Workers, which assisted local residents with welfare problems. Allen then contacted the South Carolina Council on Human

Rights, another non-profit organization, which sent appellant to the meeting in Allen's office. Had the Council on Human Rights asked Ms. Smith or another attorney, individually, to represent the women, the "legal services" organization issue would not arise. There can be no compelling state interest that supports a rule which turns upon such fine details of the process of initiating public interest litigation on behalf of clients who cannot hire counsel.

Furthermore, there is no compelling state interest that justifies restricting the non-profit legal service operations of the ACLU but not those of the other legal services organizations exempted by DR 2-103(D) -- i.e., (1) legal aid offices, (2) lawyer referral services sponsored by the general bar, or (3) local bar associations.<sup>1</sup> Any concern with steering compen-

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1. The offer of ACLU assistance in this case is analogous to that of the Atlanta Bar Association which in 1940 offered to represent, free of charge, individuals who had been victimized by loan sharks charging usurious interest rates, in suits to recover money. The conduct of the bar was not deemed unethical; it was applauded: "For all of this they should be commended." *Gunnels v. Atlanta Bar Association*, 191 Ga. 366, 374, 381, 12 S.E.2d 602, 606-07 (1940).



sated business to a limited number of attorneys is wholly inapplicable to the facts of this case, where ACLU cooperating attorneys would not have been compensated. But even if such concerns were present, they would furnish no basis for distinguishing the activities of the ACLU from those of a bar referral service which steers paying clients to attorney participants. It would also be impossible to distinguish ACLU operations from those of the NAACP, in which compensation was paid to staff attorneys to whom desegregation lawsuits were steered. NAACP v. Button, supra, 371 U.S. at 420-21.

### 3. Attorney's Fees.

The lower court also held that the ACLU was not an exempt organization under DR 2-103(D)(5)(c) because it failed to meet the requirement that it did not "derive a financial benefit from the rendition of legal services by the lawyer." J.S.A. 10a-11a. In lawsuits sponsored by the NAACP, whose conduct was sanctioned in Button, attorneys for years had sought court awards of attorney's fees along with other costs, and the federal courts made

such awards in many suits pending at the time of the Button decision. See, e.g., Bell v. School Board of Powhatan County, Va., 321 F.2d 494 (4th Cir. 1963) (en banc); County School Board v. Allen, 240 F.2d 59 (4th Cir. 1956). Suits brought by the ACLU pursuant to 42 U.S.C. §1983, against state and local governmental programs or officials qualify for an award of attorney's fees as costs under 42 U.S.C. §1988. Other provisions under which civil rights and civil liberties litigation has been sponsored by the ACLU in the past have similar provisions for awards of attorney's fees as part of the costs. See, e.g., 42 U.S.C. §2000e-5(k), §2000a-3(b) and §1973 1(e); 20 U.S.C. §1617. Many other provisions of federal law authorizing awards of attorney's fees characterize them as part of the costs. See, e.g., 15 U.S.C. §15. Surely neither this Court, the American Bar Association, or any other tribunal has ever thought that a state could have any legitimate interest in restricting the recovery of litigation costs awarded to a successful litigant by court order. When the ACLU prays for court-awarded attorney's fees, it is simply asking that,



if the plaintiff prevails, the court award it all litigation costs authorized by law. Cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 460 (1976) (concurring opinion of Mr. Justice Stevens).

The Civil Rights Attorneys' Fees Awards Act of 1976 (42 U.S.C. §1988) is based on an express congressional finding that allowing ACLU and other public interest organizations and attorneys to recover attorney's fees when they prevail in civil rights litigation is an essential mechanism for insuring the enforcement of civil and constitutional rights. See also, Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). Given that finding, there can be no legitimate and compelling state interest in deterring recovery of such fees by penalizing attorneys associated with public interest organizations.

III. APPELLANT WAS DENIED DUE PROCESS OF LAW IN THAT SHE DID NOT RECEIVE FAIR NOTICE OF THE CONDUCT CHARGED, THERE WAS NO EVIDENCE TO SUPPORT THE RULES FOUND TO BE VIOLATED, AND THE DISCIPLINARY RULES, AS CONSTRUED, ARE VOID FOR VAGUENESS.

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Throughout the entire proceedings below appellant was denied the basic requirements of due process. She was not given fair notice of the precise nature of the charges against her. She was found guilty on a record wholly devoid of evidentiary support for the finding. She was found to have violated disciplinary rules only by a construction of the rules by the state court which impermissibly and retroactively enlarged and otherwise altered the scope of the rules.

A. Lack of Notice of the Charges.

Lawyers subjected to bar disciplinary proceedings are entitled to the protections of the due process clause, including "fair notice of the charge." In Re Ruffalo, 390 U.S. 544, 550 (1968). "[The] absence of fair notice as to the reach of the grievance procedure and the precise nature of the

charges deprive[s the accused] of procedural due process." Ruffalo, supra, 390 U.S. at 552. And in deciding whether notice was constitutionally adequate, it is important to remember that bar disciplinary proceedings "are adversary proceedings of a quasi-criminal nature." Ruffalo, supra, 390 U.S. at 551. See also, Cole v. Arkansas, 333 U.S. 197, 201 (1948); In re Gault, 387 U.S. 1, 34 and n. 54 (1967); and DeJonge v. Oregon, 299 U.S. 353, 362 (1947).

Appellant was given notice only that she had allegedly violated the "Canons of Ethics" by "solicitation." J.S.A. 23a-24a. She was never told in what way her conduct was a violation, or of what disciplinary rules.<sup>1</sup> The complaint was thus fatally deficient for failure to give adequate notice of the charges.

Fair notice is not satisfied merely because an accused is notified of the conduct alleged to be unlawful. The Gaults

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1. Appellant could not have been guilty of a violation of the "Canons of Ethics" themselves because they had been repealed by the Supreme Court of South Carolina on March 1, 1973, in favor of the ABA Code. J.S.A. 8a. Moreover, only violations of the Disciplinary Rules of the ABA Code, as opposed to the Canons, are subject to disciplinary actions. ABA Code, Preliminary Statement.

knew prior to trial that their son was detained for allegedly making obscene phone calls. Yet due process was denied because neither they nor their son were given notice of "the specific issues that they must meet." 387 U.S. at 34 and n. 54. Similarly, the defendants in Cole knew that it was their picketing that was claimed to be unlawful. But due process was denied because they were not informed of the elements of the particular provision their conduct allegedly violated. Cole v. Arkansas, supra, 333 U.S. at 199-201. Cf., Wolff v. McDonnell, 418 U.S. 539, 564 (1974) (prison disciplinary proceedings). Notice of "solicitation" in violation of the "Canons of Ethics" does not allege a specific offense, nor does it "accurately and clearly allege all the ingredients of which the offense is composed." United States v. Cook, 84 U.S. (17 Wall.) 168, 174 (1872); see also, Hamling v. United States, 418 U.S. 87, 117 (1974).

The court below, although conceding that the complaint may have been "loosely drafted," was "of the opinion that respondent was fully apprised of the charges against her by the complainant." J.S.A. 8a.



But that is not the case. She was in doubt until after her conviction as to the precise charges against her. In a pre-hearing memorandum appellant argued that since there was no allegation that she accepted employment (which is dealt with in DR 2-104), "the only conceivably applicable rule is Disciplinary Rule 2-103(A)." Respondent's Pre-Hearing Memorandum of Law, p. 1.

Not until the close of the state's case, however, and only after appellant had moved to dismiss the charges for failure to state a violation of any disciplinary rule, did the state -- but not the panel -- list any rules believed to be violated, namely, DR 2-104(A)(5) and DR 2-103(D)(5)(a) and (c). App. 80-2. Even after the hearing, the state invited the panel to search for other rules that might have been violated. Memorandum filed by Complainant, April 8, 1975, p. 3. It was not until the panel rendered its decision that appellant knew the precise charges against her. In reality, appellant was tried first and the charges were specified later. That procedure denied

her due process.<sup>1</sup>

B. There Was No Evidence To Support The Conduct Charged.

Thompson v. City of Louisville, 362 U.S. 199, 206 (1960), established that it is "a violation of due process" to punish an individual without evidence of the alleged wrongdoing. Here, however, substantive elements of the offenses for which appellant was disciplined are not established by the record. DR 2-104(A) requires acceptance of employment; the August letter does not in any way involve

1. When an accused is to defend against rules which contain numerous elements, contingencies, and exceptions, actual notice of the specific charges is essential to preparation of an adequate defense. DR 2-104(A)(5), for example prohibits on its face giving unsolicited advice and accepting employment. The defense could be easily led to believe, as it was here, that the rule could not conceivably be at issue, supra, p. 69. Additionally, because the letter itself recited prior contact with Mrs. Williams, a defense to giving "unsolicited advice" would not appear relevant.



acceptance of employment. Even assuming that subsection (5) created additional violations, rather than exemptions, the state court did not find that appellant ever sought employment for herself or her associates. J.S.A. 6a. And the state court ignored other apparent requirements of subsection (5), neither of which was proven to be present here: (1) that the attorney has a client; and (2) that success in asserting that client's rights is dependent upon the joinder of others. Appellant had no client and no litigation dependent for success upon the joinder of others.

With respect to DR 2-103(D), appellant concluded the hearing with the understanding that the state and the panel had stipulated that the ACLU was exempt under subsection (1)(a), as a legal aid or public defender office operated by a non-profit community organization. App. 185. Only when the panel report was issued did appellant learn that the panel was classifying the ACLU under subsection (5). Even so, neither the panel, the board nor the court below at any time made a finding or recited any record evidence that appellant "assisted"

an organization to "promote" the use of her services or those of her associates.<sup>1</sup> There is no evidence that the ACLU promoted the use of any lawyers' services,<sup>2</sup> much less how the August letter, the only specific unethical act with which appellant was charged, assisted in any promotion.

Since the substantive offenses were not established, appellant was denied due process by the state court order finding her "guilty of unethical conduct." J.S.A. 2a.

C. The Disciplinary Rules, As Construed, Are Impermissibly Vague.

Each of the disciplinary rules defines a violation in its initial sentence; then, the subsections define exempt situations in which conduct otherwise proscribed is never-

1. The state court found only that appellant "did solicit ... on behalf of the ACLU." J.S.A. 6a.

2. The panel itself foreclosed inquiry as to how the ACLU operated but concluded that the organization's activities were entirely proper. App. 179, 184-85.

theless permitted.<sup>1</sup> The court below held that appellant could be disciplined, whether or not her conduct violated the substantive rules, if it should be shown that she failed to come within any of the several exemptions to the rules. In other words, even though her conduct was not expressly prohibited, it could be proscribed because it was not expressly permitted.

Disciplinary Rule 2-104(A) provides:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice.

It is only the acceptance, not the seeking of employment, that triggers the strictures

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1. The subsections are prefaced, in DR 2-103(D) by "However, he may . . .," and in DR 2-104(A) by "except that . . . ." And see, *Bates v. State Bar of Arizona*, U.S. \_\_\_, 97 S.Ct. 2691, 2694, n. 5 (1971).

of DR 2-104(A).<sup>1</sup> See, Smith, "Canon 2: 'A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available,'" 48 Tex.L.R. 285, 295 (1970). Five subsections specify exceptions -- circumstances in which a lawyer may accept employment "resulting from" his advice. The structure of the rule, however, clearly and unambiguously specifies a prohibition against accepting employment resulting from unsolicited advice, not against recommending employment of some third party. Yet the state court held that the exemption created an additional offense. Likewise, with respect to DR 2-103(D), the state court devoted all its discussion to what was required to prove an exemption, not what was required to prove an offense. It is an heroic exercise of grammar and logic to conclude that because

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1. The prohibition on seeking employment is set forth not in DR 2-104(A), but in DR 2-103(A). The state argued that appellant violated DR 2-103(A) by seeking to represent Mrs. Williams, App. 81-2, but neither the panel, the board, nor the state court was persuaded to so find, because the evidence did not establish that appellant had ever recommended employment of any specific attorney or law office.



an exception is not proved, the rule itself has been violated. Such a construction of the rules violates standards of precision for application of quasi-criminal statutes and regulations, particularly in the sensitive area of First Amendment freedoms.<sup>1</sup>

The vice of vagueness resulting from the construction of the rules by the court below was perfectly described by this Court in another South Carolina case:

When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction.

Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

1. The language of the rules exacerbates the vagueness in their construction. For example:

(Footnote continued to next page.)

This is a classic case in which retroactive judicial construction "may trap the innocent by not providing fair warning," Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). "Hynes v. Mayor of Oradell, 425 U.S. 610, 622 (1976). See also, Smith v. Goguen, 415 U.S. 566 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). This is precisely what the South Carolina court did here, and its ruling deprived appellant of due process.

(Footnote continued from preceding page.)

(1) What is a "primary" purpose of an organization as that term is used in DR 2-103(D)(5)(a)? What is the yardstick for distinguishing a "primary" purpose from a subsidiary one?

(2) What is the scope of the "financial benefit" to redound to the organization described in DR 2-103(D)(5)(c)? Does the "benefit" include court awards of litigation costs, so that any organization that seeks reimbursement for any taxable court costs is no longer exempt? Does the "benefit" refer to an entire litigation docket or a single case?

(3) How can anyone define with sufficient precision "the extent that controlling constitutional interpretation ... requires the allowance of such legal service activities"? See DR 2-103(D)(5). Since the interpretation of decisions incorporated by this language must necessarily be disputed and subject to change, the rule is inherently and ineluctably vague.



CONCLUSION

For the foregoing reasons, the order and judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.  
**FILED**  
DEC 27 1977  
MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1977

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**No. 77-56**

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**IN THE MATTER OF EDNA SMITH, APPELLANT,**

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**ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA**

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**BRIEF OF APPELLEE**

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## IN THE Supreme Court of the United States

October Term, 1977

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No. 77-56

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IN THE MATTER OF EDNA SMITH, APPELLANT,

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ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

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### BRIEF OF APPELLEE

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#### JURISDICTION

This is a state court disciplinary proceeding. The final order of the South Carolina Supreme Court finding misconduct and imposing discipline was entered March 17, 1977. The opinion, as yet unpublished, is attached to the Jurisdictional Statement (1a-14a). The Notice of Appeal to this Court was filed on April 15, 1977. On June 15, 1977, by order of Chief Justice Burger, the time within which to docket the appeal was extended to July 11, 1977. The Jurisdictional Statement was filed and the appeal docketed on July 9, 1977. Probable jurisdiction was noted on October 3, 1977. This Court has jurisdiction under 28 U. S. C. §1257 (2).



### QUESTIONS PRESENTED

I. Whether it is beyond the power of the state courts to protect the public against an attorney's inducement of an unwilling citizen, already aware of her legal rights, to file suit against another private citizen?

II. Whether an attorney is denied due process of law when he is informed of all the facts upon which the claim of misconduct is based, fails to object to the charges as stated in the complaint, and is subsequently found by the court to have engaged in conduct clearly prohibited by the court's disciplinary rules?

### CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

UNITED STATES CONSTITUTION, Amendment One:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

UNITED STATES CONSTITUTION, Amendment Fourteen:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The applicable sections of the ABA Code of Professional Responsibility, as adopted by the South Carolina Supreme

Court and embodied in its Rule on Disciplinary Procedure, Vol. 22, CODE OF LAWS OF SOUTH CAROLINA, 1976, are as follows:

DR 2-103. Recommendation of Professional Employment.

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

• • •

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

DR 2-104. Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal

action shall not accept employment resulting from that advice, except that:

. . .

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

### STATEMENT

The Appellant Edna Smith, a member of the South Carolina Bar, was publicly reprimanded on March 17, 1977, by the South Carolina Supreme Court for violations of Disciplinary Rules 2-103 (D) (5) (a) and (c) and 2-104 (A) (5) of the Code of Professional Responsibility.<sup>1</sup> The Court below found that Appellant had solicited a client on behalf of the American Civil Liberties Union, an organization to which she belonged and served as an attorney. Appellant Smith has filed this appeal seeking to reverse the decision of the South Carolina Supreme Court.

### Appellant's Practice

Appellant Smith is an attorney licensed to practice in South Carolina, having been admitted to the bar in 1972 (App. 86). She became an at-large member of the Board of Directors of the American Civil Liberties Union in South Carolina and has served as Vice-President of that Board since 1973 (App. 88-89). Appellant has represented clients for the ACLU as a cooperating attorney (App. 107).

After her admission to the bar, Appellant became a partner in the "Carolina Community Law Firm," a private

<sup>1</sup> Paragraph 4(b) defines misconduct as a violation of any of the Canons of Professional Ethics adopted by the Court from time to time. J.S.A. 18a. On March 1, 1973, the South Carolina Supreme Court adopted the American Bar Association's Code of Professional Responsibility.

law firm, whose other members were Herbert Buhl<sup>2</sup> and Carlton Bagly<sup>3</sup> (App. 147). The firm was organized to pursue "public interest" litigation involving welfare, prison, consumer, and other similar issues (App. 133). The members of the firm sought attorney fees for their representation of clients in "public interest" cases through grants from various foundations (App. 133). During 1973, two members of the law firm received grants from organizations including Appellant Smith who received a \$10,000 fee to serve as legal consultant to the South Carolina Council on Human Relations, a private organization (App. 128-9, 144). During 1973, Appellant's firm continued their involvement and efforts in "public interest" litigation in order to continue their foundation support, and Appellant testified that the firm was hopeful of additional money coming to the firm through these efforts (App. 144-145). Appellant recognized the necessity of having clients in welfare and consumer areas in order to continue the firm's foundation support (App. 145). Subsequently, after the events in question, the firm determined that it would not be fully funded through fees from various organizations, and changed the firm's name to Buhl, Smith & Bagby (App. 133).

<sup>2</sup> Herbert Buhl, a South Carolina attorney, has served as the staff attorney for the ACLU in South Carolina. He is paid a salary by the ACLU Foundation of New York (App. 134-135). The Appellant maintains that the Supreme Court erroneously found that Mr. Buhl was counsel in *Doe v. Pierce*, Civ. No. 74-475 (D.S.C.). Appellant's Brief, page 17, fn. 2. However, in a deposition of Shirley Brown, a plaintiff in *Doe v. Pierce*, Mrs. Brown testified that Mr. Buhl was her attorney and that she had discussed her case with Mr. Buhl and Appellant on several occasions (Respondent's [Appellant's] Exhibit No. 3 to Panel Hearing, Deposition of Mary Roe, page 5-7). The firm of Buhl, Smith & Bagby (or Carolina Community Law Firm) was listed as attorneys of record in *Doe v. Pierce*. The office of the ACLU in South Carolina was physically located in the same offices as Appellant's firm at the time of these events.

<sup>3</sup> Carlton Bagby, also a South Carolina attorney, served as a cooperating attorney with the ACLU and was also counsel of record for the ACLU in *Doe v. Pierce*, No. 74-475 (D.S.C. 1974), *aff'd in part and rev'd in part* 560 F. 2d 609 (4th Cir. 1977).



### The Aiken Meeting

In July, 1973, an Aiken resident, Gary Allen, called the South Carolina Council on Human Relations to seek its assistance in advising certain women, who had agreed to be sterilized by their private physician after their third pregnancy.<sup>4</sup> An employee of the Council requested Appellant to investigate the situation and to talk to the women about the sterilization (App. 90-91). Appellant called Mr. Allen and requested that he arrange a meeting with the women who had been sterilized (App. 90, 125). Although Mr. Allen had been a friend of Mrs. Williams' family for a number of years (App. 65), she had never sought his advice on legal or other matters and was unaware of the proposed meeting (App. 30, 65). On the day of the meeting, Mr. Allen approached Mrs. Williams as she left the Aiken County Hospital where her baby was being treated for severe dehydration and was not expected to live (App. 30). The following conversation took place between Mr. Allen and Mrs. Williams:

He just told me that I was the person that he wanted to see. And I said, "About what?" He said, "Wasn't Dr. Pierce your doctor?" I told him, "Yes." He said, "Well, didn't he operate on you?" I said, "Yes, he did." He said, "Well, you come on down to my office because there are some people down here that would like to talk to you." I said, "What kind of people, look, I don't have time to be bothered because I got a baby

<sup>4</sup> As noted by the United States Court of Appeals for the Fourth Circuit, Dr. Clovis H. Pierce was a qualified and experienced physician in Aiken, South Carolina, who established a personal economic philosophy in the treatment of certain patients, which he publicly and freely announced and constantly pursued. Dr. Pierce testified at the trial that:

My policy was with people who were unable to financially support themselves, whether they be on Medicaid or just unable to pay their own bills, if they are having a third child, to request they voluntarily submit to sterilization following the delivery of the third child. If they did not wish this as a condition for my care, then I requested that they seek another physician other than myself. *Walker v. Pierce*, 560 F. 2d 609, 611 (1977).

in the hospital and they look for my baby to die and I aint's got time for this kind of mess." He said, "There was some attorneys there and would like to see me and would like to represent me in suing the doctor for money." I said, "What the doctor did?" He said, "Because the doctor steriled [sic] you, you cannot have any more kids." And I said, "Yes, I know that, I know that, he explained that to me before I even signed the paper (App. 41).

Mrs. Williams decided to attend the meeting "to see what it was all about" (App. 41). Present at the meeting in addition to the Appellant, Mr. Allen, and Mrs. Williams were two other women, Dorothy Waters and Virgil Walker,<sup>5</sup> and members of the news media<sup>6</sup> (App. 92). Appellant Smith introduced herself to the group including Mrs. Williams and indicated that she was an attorney with the ACLU (App. 93). She had a personal conversation with Mrs. Williams, which Appellant later related at the grievance hearing:

[I] asked her her name and if she had been sterilized. She said she had. And I asked her if she wanted to discuss it. And she went into details about the doctor involved, when the incident occurred, when she first went to see the doctor, and how the issue of being sterilized came up before her baby could be delivered. She went through a chronological statement of what took place and to explain to me that she had, in effect, been sterilized, and that her baby was dehydrated, I think she mentioned, and it was now under a doctor's care and that she was concerned for her baby's health (App. 93).

Appellant explained to the group, including Mrs. Williams, that they had certain rights under the Constitution (App.

<sup>5</sup> Mrs. Walker was a plaintiff in the subsequent law suit of *Dos v. Pierce*, No. 74-475 (D.S.C. 1974).

<sup>6</sup> Appellant was the only member of the ACLU present at the meeting (App. 47).



109), that women should have their own rights as to whether they wanted to be sterilized, and that what Dr. Pierce was doing was wrong (App. 31, 111, 130). She advised the group in general that there were certain legal remedies (App. 110) and Mrs. Williams in particular that if the sterilization had been coerced she could bring a law suit (App. 31, 111). According to Mrs. Williams, the Appellant advised her that she could recover money damages and that Appellant would be Mrs. Williams' attorney (App. 32).<sup>7</sup> Appellant also informed the group that the ACLU was an organization that could render legal services to these women (App. 131).

Mrs. Williams had not considered bringing a law suit against her doctor prior to her conversation with Appellant (App. 67). Mrs. Williams informed Appellant that her baby was critically ill in the hospital and she "wasn't hardly interested about suing anybody" (App. 42). When Mrs. Williams left the meeting, she informed Appellant that if Appellant's services were needed, she would call Appellant (App. 74).

### The Solicitation

In the early part of August, 1973, the Appellant was informed by a board member of the South Carolina chapter of the ACLU and by a member of the national organization that both organizations were interested in pursuing litigation on the sterilization issue (App. 94-95). According to Appellant, the ACLU "wanted to get the women who were

<sup>7</sup> Appellant denies that she advised Mrs. Williams that she could bring a law suit, recover money damages, or that she would be Mrs. Williams' attorney. (App. 94). Appellant has sought to demonstrate that Mrs. Williams' testimony was contradictory (Appellant's Brief, p. 14, fn. 1). In fact, the record as a whole substantiates that Appellant informed Mrs. Williams that she would be the attorney but no fee was requested. Moreover, Appellant's testimony that she did not even mention a law suit was directly contradicted by her own witness, Mr. Allen, who testified that the women were advised that they could bring law suits (App. 201).

involved" (App. 116), and she was to contact the women (App. 95). The ladies had been instructed by Appellant to send their requests to the ACLU if they were interested in bringing suit (App. 97). However, prior to August 20, 1973, only one request had been received from a Mrs. Dorothy Waters (App. 116). Appellant had not received a request from Mrs. Williams for the ACLU to represent her (App. 138). Nevertheless, on August 30, 1973, Appellant wrote the letter which was the basis for the complaint in this case (App. 94). The letter<sup>8</sup> was as follows:

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a law suit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

Now I have a question to ask of you. Would you object to talking to a women's magazine about the situation in Aiken? The magazine is doing a feature story on the whole sterilization problem and wants to talk to you and others in South Carolina. If you don't mind doing this, call me collect at 254-8151 on Friday before 5:00, if you receive this letter in time. Or call me on Tuesday morning (after Labor Day), **collect**.<sup>9</sup>

I want to assure you that this interview is being done to show you what is happening to women against their wishes, and is not being done to harm you in any way.

<sup>8</sup> The Appellant failed to include the letterhead of this letter in the Joint Appendix (App. 3). The letter was written on the stationery of Appellant's private law firm, Carolina Community Law Firm, and was signed by Appellant as Attorney-at-Law. Appellant testified that she often considered her private practice, including her representation of the Council on Human Relations, interrelated with her activities as a member of the Board of the ACLU in South Carolina and her representation of the ACLU as an attorney. Therefore, she did not consider it unusual that she wrote this letter on the stationery of her private law firm (App. 140).

<sup>9</sup> Appellant admitted that the magazine interview had been instigated by the ACLU office in New York (App. 126).

But I want you to decide, so call me collect and let me know of your decision. This practice must stop.

About the law suit, if you are interested, let me know, and I'll let you know when we will come down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf<sup>10</sup> (App. 3).

The Appellant admitted that in writing the letter of August 30, 1973, she was seeking members of the plaintiff class (App. 136-137) so "the ACLU could get clients" (App. 136). The Appellant contended that Mr. Gary Allen had written a letter to her<sup>11</sup> and had telephone conversations with her in which he indicated that some of the women were interested in bringing suit (App. 97).<sup>12</sup> Therefore, Appellant wrote to Mrs. Williams, because "I did know from talking to her that she was one of the ladies who had been sterilized" (App. 116). Appellant's contention that Mr. Allen had informed her that Mrs. Williams was interested in bringing suit (App 125)<sup>13</sup> is directly contradicted by her letter of August 30, 1973. The letter, rather than referring to her information about Mrs. Williams' interest in bringing suit, merely asks:

<sup>10</sup> Although Appellant testified that the ACLU had received a letter from Mrs. Dorothy Waters requesting representation, this testimony was allowed over objection, only with the understanding that the ACLU would introduce the letter into evidence. The letter from Mrs. Waters was not produced by the Appellant for the grievance panel (App. 96).

<sup>11</sup> Again, the Appellant was requested to produce this letter, as it was the best evidence of its contents; however, the letters were never produced by the Appellant for the Panel (App. 96).

<sup>12</sup> Mrs. Williams denied that she ever told Mr. Allen that she was interested in bringing a law suit (App. 43-44).

<sup>13</sup> Appellant contradicted herself at a later point in the hearing when she testified that before she wrote her letter she had received no request from Mrs. Williams (App. 138).

About the lawsuit, if you are interested, let me know. . . (App. 4).<sup>14</sup>

The letter made no offer of free legal services and provided no information about Mrs. Williams' legal rights or remedies.<sup>15</sup> It merely recited the desire of the ACLU to bring a lawsuit on behalf of Mrs. Williams for money damages<sup>16</sup> (App. 3).

The letter was written by Appellant even though Appellant was aware that Mrs. Williams was under considerable strain due to the critical illness of her child (App. 42, 93), and even though Mrs. Williams had previously informed Appellant that she should contact Appellant if she desired representation (App. 74). The Appellant's letter became a part of a campaign to influence Mrs. Williams<sup>17</sup> into bringing suit against Dr. Pierce, as pointedly revealed by Mrs. Williams' testimony at the Panel hearing:

I got tired of everybody aggravating me. Everyone was coming to ask me wasn't I going to sign to file a

<sup>14</sup> It is apparent in posing this question to Mrs. Williams that Appellant had not been informed by Mr. Allen that Mrs. Williams was interested in bringing suit. Such a conclusion is further supported by Appellant's testimony that the letter was intended to get Mrs. Williams to communicate her interest in bringing a law suit, to either the ACLU "or Mr. Allen" (App. 137).

<sup>15</sup> Mrs. Williams had already been advised at the July meeting of her legal rights and remedies and the availability of the ACLU to provide legal services to her (App. 131).

<sup>16</sup> Appellant's emphasis on money damages in their July meeting and her letter of August 30, 1973, obviously was intended as an inducement to Mrs. Williams to bring suit:

Q. When Miss Smith talked to you about the possibility of a lawsuit against Dr. Pierce, did she mention anything else besides money to you that would be gained by the lawsuit? A. No, she didn't, she just mentioned money that I could get.

Q. Is that the only thing that she talked to you about? A. That's the only thing I heard (App. 70).

<sup>17</sup> The possibility of undue influence was particularly great with Mrs. Williams as indicated by Appellant's testimony that she observed that Mrs. Williams had very little education (App. 99). Indeed, Appellant made an offer of proof that:

Mrs. Williams has a reputation of being unstable in the community, and that she is changeable and subjective and takes one position, as he said, one day and another position the next (App. 206). Nevertheless, Appellant sent her letter of August 30, 1973, disregarding the improper influence it could obviously have on Mrs. Williams.



law suit. And after I had said a hundred times I didn't want to sue then I got the notion that maybe if I sue maybe they will leave me alone, I'm tired of being bothered (App. 57).

The effects of the pressure, as indicated by Mrs. Williams, almost induced her to bring suit against her doctor, even though, as she subsequently notified Appellant, she did not want to sue Dr. Pierce—

... I told her I didn't want any part, that I wasn't suing anybody because it didn't make sense. And I told her that the only way I would sue, bring a law suit against Dr. Pierce is that I did get pregnant<sup>18</sup> (App. 35).

### The Disciplinary Rules

On August 12, 1969, the House of Delegates of the American Bar Association adopted the Code of Professional Responsibility. This Code, which was subsequently adopted by the South Carolina Supreme Court on May 1, 1973, included Disciplinary Rules 2-103(D)(5) and 2-104(A)(5), the rules which Appellant was found to have violated. The ABA's codes of professional responsibility, including the earlier Canons of Professional Ethics (1908) and the recent Code of Professional Responsibility (1970), historically have been key guidelines for the bar as a whole. The Code of Professional Responsibility (1970) as professed by the ABA has been adopted by most state and local bar associations, legislatures, and courts.

<sup>18</sup> Mrs. Williams testified it was her desire then, as now, not to have any more children. Mrs. Williams further testified that Dr. Pierce had informed her for three months about the effects of the sterilization (App. 71).

In a subsequent lawsuit filed by the ACLU on behalf of two women for violation of their civil rights, *Doe v. Pierce, supra*, the ACLU sought damages of \$1,500,000 from Dr. Pierce. The trial of that case resulted in a verdict of \$5.00 in favor of one of the plaintiffs. The Court of Appeals reversed that verdict on the ground that the required state action was lacking. *Walker v. Pierce*, 560 F. 2d 609 (4th Cir. 1977).

### The Proceedings Below

The complaint in the grievance proceeding was initiated on October 9, 1974, by John W. Williams, Secretary of the Board of Commissioners on Grievances and Discipline as Complainant. The complaint alleged that Appellant's letter of August 30, 1973, constituted solicitation in violation of the Canons of Ethics, and, therefore, Appellant was guilty of ethical misconduct (App. 3-4.). In answer to this complaint, Appellant filed a copy of her complaint in *American Civil Liberties Union and Jane Koe v. Bozardt*, Civ. No. 74-1703 (D.S.C.), an action filed by Appellant in the United States District Court seeking, *inter alia*, to enjoin the grievance board from making an inquiry into Appellant's conduct.<sup>19</sup>

<sup>19</sup> The Appellant has throughout these proceedings attempted to divert attention from her own conduct by making accusations against others. In *ACLU v. Bozardt, supra*, Appellant contended that the initiation, filing and processing of the grievance complaint was in violation of her rights under the First and Fourteenth Amendments; that the grievance proceeding was collaterally estopped by the proceedings in *Doe v. Pierce, supra*, or alternatively, that *Doe v. Pierce, supra*, was *res judicata* as to Appellant's ethical conduct; that the South Carolina Supreme Court has no authority to review Appellant's conduct before federal courts; that the complaint was initiated in bad faith and retaliation; that Rule 4(d) of the South Carolina Supreme Court's Rule on Disciplinary Procedure was vague and overbroad (App. 5-24). On December 23, 1974, the United States District Court dismissed the complaint (App. 222-240) for failing to state facts entitling plaintiffs to federal intervention, citing *Younger v. Harris*, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). The district court's decision was affirmed by the Court of Appeals, 539 F. 2d 340 (4th Cir. 1976), and certiorari was denied by this Court — U. S. —, 97 S. Ct. 639, 50 L. Ed. 2d 623 (1976). Appellant renewed her allegations of bad faith and retaliation as a defense to the complaint in the grievance proceeding. However, Appellant made it clear that she was not alleging lack of good faith on the part of the Board of Commissioners on Grievances and Discipline in instituting these proceedings (App. 208), but rather on the part of those persons who forwarded the Appellant's letter to the Board. Although admitting that there was no statute of limitations which would restrict the review of her conduct (App. 209), Appellant felt that "timing" had something to do with whether there was a violation of professional ethics (App. 214). Apparently, Appellant's theory is that if an ethical violation is reported by an opposing attorney in other litigation, such reporting must be in bad faith or in retaliation. While noting initially that the South Carolina Attorney General's Office was not in fact acting adversely to Respondent in other litigation, since Appellant was not permitted by Mrs. Williams to bring suit, the Board of Commissioners on Grievances and Discipline and the South Carolina Supreme Court found a total lack of evidence to



substantiate Appellant's contentions (J.S.A. 7a). While Appellant has not presented this issue as a ground for appeal (J.S.A. 5), she has nevertheless attempted to reassert these arguments in her Brief (Appellant's Brief, pages 21, 22, 51 at fn. 1). Therefore, in order that Appellant's assertions do not remain unrefuted, a brief reply is necessary even though the issue is not properly before the Court.

The Appellant's letter to Mrs. Williams of August 30, 1973, came to the attention of defense attorneys in *Doe v. Pierce*, *supra*, on or about April 29, 1974, during a deposition of Eldon D. Wedlock, Jr. [There were nine attorneys involved in this particular deposition. Respondent's (Appellant's) Exhibit #2 to Panel Hearing, Deposition of Eldon D. Wedlock, Jr.). Dr. Pierce was represented by private counsel; the Attorney General's Office represented two state officials. The complaint against both of these state defendants was dismissed by the court prior to submission to the jury. *Walker v. Pierce*, 560 F. 2d 609 (4th Cir. 1977). Apparently, this letter had been in the possession of one attorney for Dr. Pierce for some time prior to the deposition. On May 10, 1974, a hearing was held in the United States District Court for the District of South Carolina at which time the Appellant's letter was brought to the court's attention by attorneys for the various defendants. The court granted permission to Dr. Pierce's attorneys to take depositions to discover the nature and extent of the solicitation. Several depositions were taken thereafter over a period of several months on the issue of solicitation, including the deposition of Shirley Brown, a plaintiff in *Doe*, on September 24, 1974, wherein Appellant maintains that Judge Blatt made a "favorable ruling" (App. 248) that no solicitation occurred. Appellant's contention that her letter was forwarded to the Board only after attempts to use it as a defense in the sterilization case were unsuccessful is absolutely incorrect, since as noted by Appellant the letter was forwarded to the Board on August 19, 1974 (Appellant's Brief, page 21), more than one month prior to Judge Blatt's "ruling." Finally, Appellant has maintained that Judge Blatt's "favorable ruling" of September 24, 1974, was never brought to the attention of the board. Appellee is not aware of what date the Board determined that a hearing should be held in regard to Appellant's conduct or even if a transcript had been made available by the court reporter prior to the issuance of the grievance complaint on October 9, 1974. Nevertheless, Appellant's contention that the "favorable ruling" was never brought to the board's attention is completely false because, indeed, it was brought vividly to their attention when the board members were served with Appellant's complaint in *ACLU v. Bozardt*, *supra*, on October 31, 1977 (App. 10). Regardless, Judge Blatt's comments were not a "favorable ruling" on the ethical considerations before the Board, as the District Court in *ACLU v. Bozardt*, *supra*, observed:

This Court cannot follow the plaintiffs' contention that Judge Blatt in his comments quoted above from *Doe v. Pierce*, decided the issue of solicitation in such a manner that it has become *res judicata* or acts as a collateral estoppel binding upon either the Board or the Supreme Court of South Carolina.

The recipient [sic] of the letter from Koe was not a party to that case. Plaintiff Koe did not represent any party in that action and was directly involved therein. There is no indication that she was questioned by the attorneys or by Judge Blatt. Certainly the Judge was not conducting a hearing as to possible disciplinary actions at the time he made his statement, which makes it clear that he was allowing questions as to solicitation, solely because it might go to the issue of the validity or appropriateness of the class action (App. 236-237).

On March 12, 1975, Appellant filed an Amended and Supplemental Answer, denying the allegations of solicitation, and alleging, *inter alia*, that her conduct was protected by the First and Fourteenth Amendments (App. 18). Appellant did not assert in her answer that the complaint failed to give her adequate notice of the misconduct charged, nor did she move to have the complaint made more definite and certain.

On March 20, 1975, this matter was heard before a panel of the Board of Commissioners on Grievances and Discipline.<sup>20</sup> At the opening of the hearing and prior to the introduction of any evidence, the chairman asked the attorneys for Appellant if Appellant was familiar with the charge in the complaint, to which Appellant replied in the affirmative (App. 28).

In fact, Judge Blatt indicated that he was only considering solicitation as it affected the merits of the case and not as ethical misconduct (App. 254), and he specifically indicated on three occasions that the ethics of Appellant's conduct was a consideration for a grievance committee (App. 255, 256, 257). The Appellant's contention that the forwarding of a possible ethical violation to a grievance committee by opposing counsel demonstrates bad faith or retaliation completely ignores a lawyer's duty under the Code of Professional Responsibility. DR 1-103 (A) provides:

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Appellant's allegations of bad faith and retaliation have absolutely no merit and are only intended to create a "smoke screen" to veil her misconduct by attempting to create an atmosphere of "official lawlessness," *Dembrowski v. Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965), or of official oppression of certain types of litigation, *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). The courts have long recognized the duty and responsibility of a lawyer as an officer of the court to bring misconduct of other attorneys, even opposing attorneys, to the attention of the court:

When an attorney discovers a possible ethical violation concerning a matter before the court, he is not only authorized but is in fact obligated to bring the problem to that court's attention. [Citations omitted.] Nor is there any reason why this duty should not operate when, as in the present case, a lawyer is directing the court's attention to the conduct of opposing counsel. In fact, a lawyer's adversary will often be in the best position to discover unethical conduct. *In re Gopman*, 531 F. 2d 263 (5th Cir. 1976).

<sup>20</sup> The hearing was delayed until Appellant's action in federal court, *ACLU v. Bozardt*, *supra*, was resolved.

At the close of the complainant's case, Appellant moved to dismiss the Complaint (App. 77). In arguments on Appellant's motion, both disciplinary rules involved herein were published and argued (App. 80-82); Appellant did not maintain surprise or indicate in anyway that she was not aware of the disciplinary rules involved. In fact, Appellant presented two out-of-state witnesses for the purpose of testifying in her behalf as to these particular disciplinary rules (App. 168-169, 183-184).

On October 6, 1975, the Panel filed its Report finding Appellant guilty of misconduct in that she solicited a client on behalf of the American Civil Liberties Union (J.S.A. 6a). In particular, as to DR 2-103(D)(5), the Panel found that the ACLU, a non-profit organization that recommends, furnishes, and pays for legal services to individuals, has as a primary purpose the rendition of legal services, noting the testimony of Appellant's own witnesses (App. 188)<sup>21</sup> and the arguments of her Brief that the ACLU and its state affiliates on any given day are involved in several thousand active cases throughout the country (J.S.A. 10a). Moreover, the Panel found that the ACLU would derive financial benefit from the rendition of these legal services by its attorneys through court awards of attorney fees, which fees go to its central fund and are used among other things to pay the costs, salaries and expenses of its staff attorneys (J.S.A. 10).<sup>22</sup> The Panel concluded that it was improper for Appellant to recommend to Mrs. Williams that she retain the services of Appellant, her partners, or

<sup>21</sup> Mr. Charles Lambeth, who has served on the National Board of Directors of the ACLU testified that the ACLU does not represent individuals in every type of litigation, but only in litigation which the ACLU feels there is "sufficient movement."

<sup>22</sup> Mr. Lambeth testified that the attorney fees received by the ACLU are used for the benefit of the organization (App. 188). The Board of Directors of the ACLU primarily controls the finances of the organization and at meetings, the Directors discuss "everything that pertains to the operation of the business just like any other organization might" (App. 177).

associates who assist the ACLU. In regard to DR 2-104(A)(5), the Panel found that after Appellant had given unsolicited advice to Mrs. Williams, a lay person, as to her legal rights and remedies, Appellant solicited Mrs. Williams to join in a class action for money damages to be brought by the ACLU (J.S.A. 9a). The panel recommended that Appellant be given a private reprimand. On January 9, 1975, the full Board affirmed the Panel's findings of misconduct and recommendation for a private reprimand.

On July 27, 1976, the Appellant petitioned the South Carolina Supreme Court to review the grievance proceeding. On September 17, 1976, Appellant's petition was granted and thereafter briefs were submitted and oral arguments made to the court. On March 17, 1977, the South Carolina Supreme Court issued its Opinion affirming the Board's findings of misconduct,<sup>23</sup> but holding that Appellant's conduct was sufficiently aggravated so as to warrant a public reprimand.<sup>24</sup>

<sup>23</sup> Both the South Carolina Supreme Court and the Board of Commissioners on Grievances and Discipline were of the opinion that violations of the two disciplinary rules would also constitute conduct tending to bring the courts or the legal profession into disrepute. Rule on Disciplinary Procedure, Section 4(d), CODE OF LAWS OF SOUTH CAROLINA (1976), Vol. 22.

<sup>24</sup> It is well established in South Carolina, that the South Carolina Supreme Court has the ultimate responsibility to review all disciplinary proceedings. In *Burns v. Clayton*, 237 S. C. 316, 117 S. E. 2d 300 (1960), the court held that:

[the members of the Board are] commissioned and charged with the duty of investigating alleged misconduct on the part of their fellow members of the bar of this state and of reporting to this court the proceedings of their inquiry, and their findings and recommendations; that the Board's report is advisory only, this Court being in nowise bound to accept its findings of fact or to concur in its recommendations; and upon this court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate disciplinary action thereabout.

The complainant in grievance proceedings normally does not take a position as to the appropriate discipline to be imposed in a particular case (See, e.g., App. 2). However, the court has on numerous occasions increased the discipline from that recommended by the Board. See, e.g., *In re Irvine Belser*, Opinion No. 20555, December 1, 1977 (private



### SUMMARY OF ARGUMENT

The right of a state to regulate the practice of law within its borders in order to protect the public health, safety, and other valid interests is manifestly recognized. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). The disciplinary rules in this case are not total prohibitions of solicitation by attorneys, but are narrowly-drawn regulations which seek to permit practices which may without adverse consequences enhance public awareness of the availability of legal counsel and contribute to the informed choice of counsel. In devising a satisfactory solution to this very complex problem, state regulatory authorities should be entitled to determine selectively whether particular instances of solicitation are harmful to the public and prohibit those practices. The regulation of the solicitation in this case is supported by a number of important state interests, which have been recognized historically by the profession, the courts, and even federal and state agencies.

Very simply the state's position in this case is that it has a legitimate and compelling interest in protecting the public against an attorney's inducement of an unwilling

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reprimand to public reprimand); *In re John Lake, Jr.*, Opinion No. 20477, August 3, 1977 (indefinite suspension to disbarment); *In re Billy R. Craig*, Opinion No. 20452, June 13, 1977 (private reprimand to public reprimand); *In re Winston W. Vaught*, Opinion No. 20428, May 13, 1977 (private reprimand to public reprimand); *In re Rogers Kirven*, 267 S. C. 668, 239 S. E. 2d 899 (1977) (public reprimand to indefinite suspension); *In re W. Richard James*, 267 S. C. 474, 229 S. E. 2d 594 (1977) (public reprimand to indefinite suspension); *In re Max B. Cauthen, et al.*, 267 S. C. 448, 229 S. E. 2d 340 (1977) (public reprimand to indefinite suspension); *In re John Felder*, 265 S. C. 192, 217 S. E. 2d 225 (1975) (resignation to disbarment); *In re Geddes H. Martin*, 264 S. C. 1, 212 S. E. 2d 251 (1975) (resignation to indefinite suspension); *In re R. Peter Julian*, 260 S. C. 48, 194 S. E. 2d 195 (public reprimand to indefinite suspension); *In re Dorothy V. Sampson*, 259 S. C. 471, 192 S. E. 2d 859 (1972) (public reprimand to indefinite suspension); *In re Albert A. Kennedy*, 54 S. C. 463, 176 S. E. 2d 125 (1970) (public reprimand to indefinite suspension); *In re C. M. Benedict, III*, 254 S. C. 481, 175 S. E. 2d 897 (1970) (indefinite suspension to disbarment).

citizen, already aware of her legal rights, to file suit against another private citizen. The Appellant takes the position that no possible harm can result from such solicitation, if the legal services are to be rendered without a fee. In response to this, no better argument can be advanced than the one presented by the prospective client in this case:

I got tired of everybody aggravating me. Everybody was coming to ask me wasn't I going to sign to file a law suit. And after I had said a hundred times I didn't want to sue then I got the notion that maybe if I sue they will leave me alone, I'm tired of being bothered. (App. 57).

The First Amendment does not protect the right of an attorney to stir up unnecessary and unwanted litigation. The role of an attorney as an officer of the court is to settle disputes between private citizens; he should not assume the role of provoking such disputes. While litigation against government may be an appropriate method for the citizenry to make its views known to government, the Court has in the past recognized the harm that derives from causing dissention among neighbors, especially in instances where established relationships will be disrupted, as in this case that of a doctor and his patient. *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). Moreover, the state has a legitimate interest in insuring that those who resort to the courts have a pressing personal need and are not induced by an attorney to bring litigation merely for the prospects of financial reward, or because of other undue influence, harassment or overreaching. Furthermore, attorneys have no First Amendment rights to secure clients in order to assert a cause that the attorney desires to litigate. The state's interest in regulating such conduct becomes especially significant in the context of legal services organizations which otherwise have no standing to bring suit.



In determining which practices should be allowed, the states are obviously concerned with preventing false and misleading solicitation, as well as communications which confuse or fail to inform. Such communications have never been protected under the First Amendment. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). In *Bates v. State Bar of Arizona*, — U.S. —, 97 S. Ct. —, 53 L. Ed. 2d 810, 836 (1977), the Court noted the inherently misleading nature of in-person solicitation which might warrant restriction. The misleading nature of solicitation follows from human nature, *i.e.*, the instinct to promote one's better qualities while concealing one's faults. Therefore, solicitation provides a very imperfect foundation for the prospective client to select an attorney. Furthermore, some attorneys may purposefully conceal potential conflicts of interest with the prospective client as, for example, conflicts of the attorney *vis-a-vis* the client in the aims and purposes of the proposed litigation.

But these are not the only concerns of the state. The state has the right to protect its citizens from unwarranted invasion of their privacy—a constitutional right as important as free speech. Furthermore, certain methods of providing information concerning legal services may affect the quality and nature of these services, may affect the costs of such services, may have an adverse effect on the administration of attorney discipline, and indeed even adverse consequences for the judicial system.

Even if the Court should find that Appellant's activities are afforded some protection under the First Amendment as commercial speech, the state's legitimate and compelling interests outweigh the attorney's right to offer his services by soliciting clients. The Appellant reluctantly acknowledges the need for regulation in certain instances of solicitation by attorneys, but focuses on what she characterizes as the "overbreadth" of the ABA's Code of Profes-

sional Responsibility. The Court, however, has refused to apply the overbreadth doctrine to commercial speech. *Bates v. State Bar of Arizona*, *supra*.

Appellant's contention that she was not given adequate notice of the misconduct charged is not supported by the record. Appellant was advised of the facts upon which the claim of misconduct was based. She made no objection to the charges as stated in the complaint and even affirmatively stated that she was prepared to go forward with the hearing. The record amply supports the finding of the South Carolina Supreme Court that Appellant's conduct was clearly prohibited by its disciplinary rules.

## ARGUMENT

### I

**The Ethical Standards do not conflict with First Amendment Rights and are justified by a compelling state interest.**

Mr. Justice Cardozo, in reviewing the conduct of a member of the New York bar, made the following succinct observation:

Membership in the bar is a privilege burdened with conditions. . . [This attorney] was received into that ancient fellowship for more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice. *People v. Culin*, 248 N.Y. 465, 470-471, 162 N.E. 487, 489 (1928).<sup>25</sup>

The earliest pronouncements of legal jurisprudence have recognized the wisdom, and indeed, the absolute necessity for courts to possess authority to control the conduct of its officers and to remove from the profession those persons

<sup>25</sup> Quoted with approval by Justice Frankfurter in *Theard v. United States*, 354 U. S. 278, 281, 77 S. Ct. 1274, 1276, 1 L. Ed. 2d 1342, 1344 (1957).

whose conduct has proved them unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney.<sup>26</sup> See, *Ex parte Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883). Likewise, this Court has recognized from its earliest decisions that the right to control the practice of law in the state courts is vested in the states. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1873); *Ex parte Lockwood*, 154 U. S. 116, 14 S. Ct. 1082, 38 L. Ed. 929 (1894). More recently, this Court again had occasion to reassert the dominant role of the states in regulating the legal profession:

We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." [citations of authority omitted]. The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the court. *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 792, 95 S. Ct. 2004, —, 44 L. Ed. 2d 572, 588 (1975).

In South Carolina, as in most states, the authority to regulate the legal profession is vested in the state Supreme Court.<sup>27</sup> Pursuant to this responsibility, the South Carolina

<sup>26</sup> In *Cohen v. Hurley*, 366 U. S. 117, 123-4, 81 S. Ct. 954, —, 6 L. Ed. 2d 156, 162 (1961), the Court recognized that English and American courts have possessed for centuries the authority to exercise disciplinary powers over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied.

<sup>27</sup> Section 40-5-10, CODE OF LAWS OF SOUTH CAROLINA, 1976, recognizes the inherent authority of the South Carolina Supreme Court to discipline attorneys in South Carolina.

Supreme Court has promulgated a code of conduct with attendant disciplinary rules entitled, "The Rule on Disciplinary Procedure for Attorneys."<sup>28</sup>

Traditionally, the courts have prohibited solicitation of legal business by attorneys.<sup>29</sup> Justifications for such prohibitions have on occasion been noted by this Court:

It is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court. . . *Cohen v. Hurley*, 366 U. S. 117, 124, 81 S. Ct. 954, —, 6 L. Ed. 2d 156, 162 (1961).

And again in its last Term, this Court noted:

[We] also need not resolve the problems associated with in-person solicitation of clients- at the hospital room or the accident site, or in any other situation that breeds undue influence- by attorneys or their agents or "runners." Activity of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising. *Bates v. State Bar of Arizona*, — U.S. —, 97 S. Ct. —, 53 L. Ed. 2d 810, 825 (1977).

In promulgating the Code of Professional Responsibility (1970), the American Bar Association provided narrowly-drawn disciplinary rules which dictate "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."<sup>30</sup> The disciplinary rules involved in the instant case were specifically drawn to conform to this Court's pronouncements on the issue of solic-

<sup>28</sup> See, Volume 22, CODE OF LAWS OF SOUTH CAROLINA, 1976. Pursuant to section 4(b) of the Rule, the court adopted on May 1, 1973, the Code of Professional Responsibility of the American Bar Association (1970).

<sup>29</sup> Barratry, maintenance and champerty were offenses at common law. Canons 27 and 28 of the ABA's Canons of Professional Ethics (1908) continued this prohibition.

<sup>30</sup> Preliminary Statement, Code of Professional Responsibility (1970).



itation of legal business.<sup>31</sup> Therefore, the constitutional question is approached from two standpoints, first, the prior decision of the Court, and second, the compelling state interests which warrant these disciplinary rules.

#### A. Prior Decisions

We start by recognizing at the outset that solicitation of legal business is not wholly outside the area of freedoms protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). But certainly, Disciplinary Rules 2-103(D) and 2-104(A) are not absolute bans on all solicitation of legal business, nor, as Appellant contends, an absolute ban on all offers of free legal assistance.<sup>32</sup> Viewed strictly from the standpoint of case law, the prior decisions of this Court have recognized the compelling and legitimate state interest in proscribing solicitation.

Appellant relies primarily on the Court's decision in *NAACP v. Button* to support her arguments of First Amendment protection. However, a reading of that case demonstrates that the Court's decision proffers no such protection to Appellant.<sup>33</sup> In *Button*, the Court reviewed the constitutionality of a Virginia criminal solicitation statute which had been amended and broadened in 1956 to threaten the civil rights group activities of the NAACP.<sup>34</sup> This Court placed importance on the type of legal actions undertaken by the NAACP in holding that the First Amendment afforded some protection to orderly group

<sup>31</sup> See, e.g., DR 2-103(D)(5), Code of Professional Responsibility (1970), fn. 123.

<sup>32</sup> Appellant's Brief, page 41.

<sup>33</sup> It is apparent that the Court's holding did not grant a blanket exemption to the NAACP, its affiliates and legal staff, from State regulation of the legal profession, but rather extended such protection only for their activities as shown on the record. *NAACP v. Button*, 371 U.S. 415, 428-9, 83 S. Ct. 328, 9 L. Ed. 2d 405, 415 (1963).

<sup>34</sup> *Id.* at 423, 435-36, 445-57, 83 S. Ct. 328, 9 L. Ed. 2d 405, 412, 419, 425-26 (1963).

activities whereby minorities seek through lawful means to achieve legitimate political ends:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all governments, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. . . .<sup>35</sup>

In so holding, the Court made the following findings in regard to the record before it:

1. The NAACP limited its sponsorship of law suits to actions against government and did not involve itself in essentially private litigation for damages;<sup>36</sup>
2. There were no monetary stakes involved in NAACP sponsored litigation and their legal staff had no financial interest in the litigation since they received neither salary nor retainer;<sup>37</sup>
3. There were no potential conflicts of interest between the NAACP and its members and non-members because no monetary stakes were involved and because their aims and interests were identical;<sup>38</sup>
4. There was no evidence that the NAACP participated in or managed the actual conduct of litigation;<sup>39</sup>
5. There was no evidence that the NAACP had overreached any potential client by attempting to persuade the clients to bring the lawsuit through undue pressure or harassment;<sup>40</sup> and
6. The NAACP was drawn into litigation either through requests directly from the aggrieved party or through authorization forms signed at meetings held by the NAACP and voluntarily attended by members and non-members.<sup>41</sup>

<sup>35</sup> *Id.* at 430, 83 S. Ct. at —, 9 L. Ed. 2d at 416.

<sup>36</sup> *Id.* at 420, 441, 93 S. Ct. at —, 9 L. Ed. 2d at 441, 423.

<sup>37</sup> *Id.* at 420, 443, 83 S. Ct. at —, 9 L. Ed. 2d at 411, 424.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 433, 83 S. Ct. at —, 9 L. Ed. 2d at 418. Moreover, in the context of the NAACP's activities, the aims and interests of the NAACP and non-member clients were identical, i.e., equality of treatment of members of the American Negro community.

<sup>40</sup> *Id.* at 422, 433, 83 S. Ct. at —, 9 L. Ed. 2d at 412, 418.

<sup>41</sup> *Id.* at 421, 83 S. Ct. at —, 9 L. Ed. 2d at 411.



The Court concluded that the statute was unconstitutional, not because it prohibited particular acts of solicitation, but because it proscribed any arrangement by which prospective clients were advised to seek the assistance of particular counsel. Thus, the Virginia statute was so vague and overboard as to potentially ban even the simple referral or recommendation of *any* lawyer including attorneys outside the NAACP's legal staff. In the last analysis, the Court in *Button*, found that the NAACP's activities as established by that record fell within the First Amendment protection and that the state failed to advance any compelling state interest warranting the regulation of those activities.<sup>42</sup>

In three subsequent cases the Court considered the question of recommendation of particular attorneys in the context of "collective activity" undertaken by unions for the benefit of its members.<sup>43</sup> The issue before the Court was not whether law suits were being cultivated by attorneys, but rather whether an association can exist for the purpose of facilitating the securing or asserting of the legal rights of its members. The unions were not a politically impotent group, and, therefore, were not using the courts as a means of "political expression" as in *Button*. Litigation as a form of speech was only considered as appurtenant to the freedom of association. The real concern of the court in the union cases was the protection of the First Amendment right to undertake collective activity in order to obtain meaningful access to the courts.<sup>44</sup> The Court noted that:

<sup>42</sup> NAACP v. Button, 371 U. S. 415, 444, 83 S. Ct. 328, —, 9 L. Ed. 2d 405, 424 (1963).

<sup>43</sup> Brotherhood of R. Trainmen v. Virginia, 377 U. S. 1, 84 S. Ct. 1113, 12 L. Ed. 2d 89 (1964); United Mine Workers v. Illinois Bar, 389 U. S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967); United Transportation Union v. Michigan, 401 U. S. 576, 91 S. Ct. 1076, 28 L. Ed. 2d 339 (1971).

<sup>44</sup> United Transportation Union v. Michigan, 401 U. S. 576, 585, 91 S. Ct. 1076, —, 28 L. Ed. 2d 239, 247 (1971).

1. The unions' activities facilitated the securing of benefits to which by statute the union members were already entitled;<sup>45</sup>
2. The unions received no financial benefit from the litigation;<sup>46</sup>
3. There was no potential conflict of interest between unions and their members;<sup>47</sup>
4. There was no evidence that the unions participated in or managed the actual conduct of litigation;<sup>48</sup>
5. There was no overreaching or harassment of union members;<sup>49</sup> and
6. Attorneys selected or retained by the unions did not solicit business.<sup>50</sup>

The Court again concluded that the state had failed to set forth a compelling interest to warrant restriction of the group legal action demonstrated by the records in those cases.

Of primary importance to the Court in *NAACP v. Button*, *supra*, and its progeny, was the fundamental right of individuals to receive information regarding their legal rights and appropriate means for effectuating those rights. However, the Court in each case explicitly stated that its decision was based only upon the record before the Court,

<sup>45</sup> Brotherhood of R. Trainmen and United Transportation Union involved union activities in suits under the Federal Employers Liability Act (FELA), and United Mine Workers involved similar union activities relating to claims under state workmen's compensation acts.

<sup>46</sup> Brotherhood of R. Trainmen v. Virginia, 377 U. S. 1, at footnote 9, 84 S. Ct. 1113, —, 12 L. Ed. 2d 89, 93 (1964); United Mine Workers v. Illinois State Bar Assn., 389 U. S. 217, 221, 88 S. Ct. 353, —, 19 L. Ed. 2d 426, 430 (1967); United Transportation Union, 401 U. S. 576, 582-83, 91 S. Ct. 1076, —, 28 L. Ed. 2d 339, 345 (1971).

<sup>47</sup> See, United Mine Workers v. Illinois State Bar Assn., 389 U. S. 217, 224, 88 S. Ct. 353, —, 19 L. Ed. 2d 426, 432 (1967).

<sup>48</sup> Brotherhood of R. Trainmen v. Virginia, 377 U. S. 1, 6-7, 84 S. Ct. 1113, —, 12 L. Ed. 89, 93 (1964); United Mine Workers v. Illinois State Bar Assn., 389 U. S. 217, 219-20, 88 S. Ct. 353, —, 19 L. Ed. 2d, 426, 429 (1967); United Transportation Union v. Michigan, 401 U. S. 576, 581, 91 S. Ct. 1076, —, 28 L. Ed. 2d 339, 344 (1971).

<sup>49</sup> See, United Mine Workers v. Illinois Bar Assn., 389 U. S. 217, 220, 225, 88 S. Ct. 353, —, 19 L. Ed. 2d 426, 429, 432 (1967).

<sup>50</sup> See, Brotherhood of R. Trainmen v. Virginia, 377 U. S. 1, 7, 84 S. Ct. 1113, —, 12 L. Ed. 2d 89, 93 (1964).

implicitly recognizing that different group activities might warrant proper state regulation. Therefore, in order to place this case in perspective with prior decisions of the Court, some comparison of the facts and the group activities involved is necessary.<sup>51</sup>

The disciplinary rules in this case, unlike the Virginia statute in *NAACP v. Button*, are not censorial rules directed at a particular group or viewpoint. Rather, the rules seek to regulate attorney conduct in an even-handed and neutral manner. *Broadrick v. Oklahoma*, 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). Moreover, the American Civil Liberties Union in seeking to advance its views of civil liberties is not a politically impotent group.<sup>52</sup> The ACLU's chief efforts in the area of civil liberties are exerted in the courts,<sup>53</sup> normally on behalf of individuals who are not members of the union.<sup>54</sup> Therefore, the concept of "collective activity" undertaken by union members to assist each other in asserting their legal rights as expounded in prior decisions of the Court applies weakly if at all in this case. The Appellant's letter of solicitation did not propose a lawsuit against government as in *NAACP v. Button*, but an action for money damages against the prospective client's private physician. Although the lawsuit

<sup>51</sup> Appellee will show *infra*, Part B, that the state does have a compelling state interest in regulating the activity of Appellant involved in this case.

<sup>52</sup> "The ACLU's prestige as a non-partisan defender of civil rights has enabled it to command free legal talent and extensive publicity through which it has exercised an influence far out of proportion to its small membership and limited expenditures." *Private Attorneys-General: Group Action In The Fight For Civil Liberties*, 58 Yale L. J. 574, 575-6 (1949). The Appellant notes that the ACLU presently has more than 250,000 members in 49 state-wide affiliates and 379 local chapters (Appellant's Brief, page 26).

<sup>53</sup> *Id.* at 576. Although the ACLU does lobby and provide educational programs for the public, its main efforts traditionally have been through litigation. Appellant maintained in her arguments before the Hearing Panel that the ACLU was involved in an extensive program of litigation, and on any given day, the ACLU and its state affiliates are involved in several thousand active cases throughout the country. J.S.A. 10a.

<sup>54</sup> The potential client in this case, Mrs. Williams, was not a member of the ACLU.

might be of public interest, it was, very simply, private litigation. While this Court has extended First Amendment protection to certain types of private litigation, it has only done so in the context of collective activity, *i.e.*, group legal services to members. Certainly, the Court in *Brotherhood of R. Trainmen, United Mine Workers, and United Transportation Union, supra*, did not hold, as argued by Appellant, that unions could solicit the legal business of individuals outside the union membership. Moreover, the Court in the "union" cases was concerned only with solicitation of legal business by non-lawyers. Recently, this court acknowledged that different considerations would apply for solicitation of legal business by lawyers. *Bates v. State Bar of Arizona*, — U. S. —, 97 S. Ct. —, 53 L. Ed. 2d 810 (1970). The record in the instant case clearly establishes different activities and conduct by Appellant than that involved in prior decisions of this court:

1. Appellant sought to solicit private litigation on behalf of the ACLU from an individual who was not a member of the union;
2. The ACLU would derive financial benefit from the proposed law suit in the form of court awarded attorneys' fees; in addition, Appellant derived personal financial gain from "foundation" support for her involvement in "public interest" litigation;
3. There was a conflict of interest in the aims and interests of the ACLU and the non-member potential client, because there were monetary stakes and because the prospective client's primary interest in money damages would potentially conflict with the ACLU's interest in establishing new civil liberty precedents of broad effect;
4. The ACLU, as a legal services organization, does participate in the actual conduct of the litigation;
5. There was substantial overreaching, misleading, and undue influence by Appellant in attempting to in-



duce the potential client to allow the ACLU to file suit; and

6. The solicitation invaded the privacy of the home.<sup>55</sup> The Appellee finds no fault in Appellant's conduct in meeting with the women to advise them of their legal rights, even if such advice was unsolicited.<sup>56</sup> There is no doubt that such activity is protected under the First Amendment. *NAACP v. Button*, *supra*. Moreover, this Court has recognized the First Amendment concern that aggrieved parties know how to effectuate their legal rights. *Bates v. Arizona State Bar*, *supra*. We do not disagree with that fundamental principle. The record amply establishes that Mrs. Williams received information protected by the First Amendment when she met with Appellant in July, 1973. Appellant talked at length with Mrs. Williams about her case (App. 93), informed her of her legal rights (App. 109) and remedies (App. 31, 110, 111) and even advised her that the ACLU was an organization that could render legal service to her (App. 131). Having been so informed, Mrs. Williams was in a position to make an informed, independent decision of her own best interests.<sup>57</sup>

Appellant's letter of August 30, 1973, one month after the July meeting, did not provide any additional information to Mrs. Williams. The letter was intended solely for the purpose of persuading or pressuring Mrs. Williams to bring a law suit and to allow the ACLU to handle the case.

<sup>55</sup> These points will be discussed in detail in Part B, *infra*.

<sup>56</sup> DR 2-104(A) recognizes that unsolicited advice may be offered by an attorney.

<sup>57</sup> The theory of free speech is grounded on the belief that people will make the right choice if presented with all points of view on a controversial issue. Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 881 (1963); *see also*, *Capitol Broadcasting Company v. Mitchell*, 333 F. Supp. 582 (D. C. 1971), *aff'd sub nom.*, *Capitol Broadcasting Co. v. Acting Attorney General*, 405 U. S. 1000 (1972); *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U. S. 748, 770, 96 S. Ct. 1817, —, 48 L. Ed. 2d 346, 363 (1976).

It was because of the August letter, not the July meeting, that the South Carolina Supreme Court found that Appellant had violated its disciplinary rules. By Appellant's own admission at the disciplinary hearing, she was seeking members of the plaintiff class as clients for the ACLU (App. 136-7). The inquiry thus becomes: May an attorney, after having informed a layman of his legal rights and the means for effectuating those rights, thereafter attempt to induce or persuade that person to bring a law suit and to allow that attorney, his firm or organization (even though the party solicited is not a member) to handle the litigation? To answer this question in the affirmative would be tantamount to establishing, on a constitutional level, a right of an attorney to litigate.<sup>58</sup> The result would not only destroy the longstanding rules and concepts forbidding the solicitation of legal business, but would also destroy, erode, or bring into serious doubt all rules and concepts heretofore based upon the traditional attorney-client relationship.<sup>59</sup> But just as there is no constitutional right as such to practice law, *Theard v. United States*, 354 U. S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957); *Konigsberg v. State Bar of California*, 366 U. S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), there is no First Amendment right of attorneys to litigate. To protect the "right" of an attorney to persuade or pressure a prospective client into permitting the attorney to file a law suit on the client's behalf, as contended by Appellant, would **not** in effect foster in-

<sup>58</sup> Of course, such a ruling would be a completely unwarranted extension of prior rulings of the Court which viewed the right of association and the right of vigorous advocacy only from the standpoint of the aggrieved party.

<sup>59</sup> *See, e.g.*, ABA's Code of Professional Responsibility (1970), DR 2-105 (Limitation of Practice); DR 2-109 (Acceptance of Employment); DR 2-110 (Withdrawal from Employment); DR 3-101, *et seq.* (Aiding Unauthorized Practice of Law); DR 4-101 (Preservation of Confidences and Secrets of a Client); DR 5-101, *et seq.* (Conflict of Interest); DR 6-101 (Competency); DR 7-101, *et seq.* (Representing Client Zealously within the Bounds of the Law).



formed, independent decision making, but rather would hinder it. Prospective clients would select lawyers on the basis of who gets there first, or who makes the most attractive sales pitch, or as in this case, he may be tempted to bring the law suit to get rid of the annoying attorney.<sup>60</sup> Appellant contends, nevertheless, that the First Amendment protects the solicitation of legal business if the services will be rendered **free**,<sup>61</sup> as opposed to solicitation of legal services **for a fee**.<sup>62</sup> But if one starts from the basic premise that the First Amendment protects the right to receive information and ideas, *Bigelow v. Virginia*, 421 U. S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975); *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U. S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), then such protection would exist regardless of whether the solicitation of legal services is for a fee or not. In other words, gain has little importance in the First Amendment area. *New York Times Co., v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Bigelow v. Virginia*, *supra*; *Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*. Therefore, if, as Appellant argues, the First Amendment protects the right of an attorney to solicit legal business, it does so regardless of whether the legal services are free or for a fee.

<sup>60</sup> Mrs. Williams testified that she almost decided to bring suit for this reason. (App. 57).

<sup>61</sup> Appellant's Brief, page 41.

<sup>62</sup> Appellant does not define "free" legal services. She does acknowledge that the ACLU normally seeks court awards of attorney fees which are used for the benefit of the organization including its staff attorneys (App. 188). Apparently, therefore, legal services are "free" if paid by the opposing party rather than the ACLU's client. Under this definition, contingency fee cases would be "free" since in reality the fee is also being obtained out of damages paid by the opposing party.

Moreover, although Appellant presented testimony that awards of attorney fees encourage attorneys to undertake cases involving civil liberties because of the promise of financial reward (App. 174), she takes the somewhat incongruous position that the motive of financial gain was not present in this case. *Amici Public Citizen and the National Resource Center for Consumers of Legal Services* state that under current ACLU policies, cooperating attorneys may retain court-awarded attorney fees. (Brief, page 14, at footnote 8.)

If any First Amendment argument can be asserted by Appellant, it must be that solicitation of legal business is protected by the First Amendment as "commercial speech." This Court has for many years debated and struggled with the difficult and perplexing question of what protection is afforded to "commercial speech." Starting from a basis that commercial speech was outside the protection of the First Amendment, *Valentine v. Chrestensen*, 316 U. S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1952), the Court attempted in its later decisions to temper *Valentine* at first by distinguishing "commercial" advertisements from "editorial" advertisements, *New York Times v. Sullivan*, *supra*, and then by holding that the First Amendment protected commercial advertisements which contained a clear "public interest." *Bigelow v. Virginia*, *supra*. Finally, in *Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*, this Court held that the First Amendment even protects commercial speech, which does nothing more than propose a commercial transaction to the public, again noting the traditional concern that people be better informed in order to perceive their own best interests. However, the Court has recognized that not all speech is protected, specifically finding that untruthful and misleading speech,<sup>63</sup> and speech proposing unlawful conduct have never been protected. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U. S. 748, 771-3, 96 S. Ct. 1817, —, 48 L. Ed. 2d 346, 364-5 (1976); *Konigsberg v. State Bar of California*, *supra*. The facts of this case do not support Appellant's contention that her August 30, 1973, letter informed Mrs. Williams of her legal rights or in fact that it provided Mrs. Williams with any information that Appellant had not already given her. On the other hand, the record amply demonstrates that the purpose of the let-

<sup>63</sup> Appellant's letter of solicitation is not protected under the First Amendment because it was misleading to Mrs. Williams. *See*, Part B, paragraph 4, *infra*.

ter was merely to secure a client. Since it conveyed neither ideas or information, her conduct in writing the letter did not promote informed decision-making. As with untruthful or misleading statements concerning legal services, solicitation intended to unduly influence or overreach should not be afforded protection under the First Amendment.

In its last Term, the Court applied its holding in *Va. Pharmacy Bd.* to advertising of routine legal services by lawyers. *Bates v. State Bar of Arizona*, — U. S. —, 97 S. Ct. —, 53 L. Ed. 2d 810 (1977). However, there is a very real difference between **public** commercial advertising of legal services and **personal** solicitation of legal services. Advertising conveys information of public interest to a diverse audience; personal solicitation, on the other hand, carries personal information, which may or may not be desired or wanted. Moreover, solicitation, unlike public advertising, involves the invasion of privacy of others. *Breard v. Alexandria*, 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), and results in the solicitor's message being thrust upon the prospective client as a captive audience. *Lehman v. City of Shaker Heights*, 418 U. S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974). Solicitation, therefore, involves more than speech. It also involves **conduct**; it is speech **plus**. *NAACP v. Button*, 371 U. S. 415, 455, 83 S. Ct. 328, —, 9 L. Ed. 2d 405, 431 (1963) (Justice Harlan dissenting). As the court in *Lehman* observed:

Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the

Amendment to the speech in question. *Id.* at 302-3, 94 S. Ct. 2714, —, 41 L. Ed. 2d 770, 777.<sup>64</sup>

The First Amendment, therefore, does not grant an attorney, or anyone, the right to spread his commercial message to a captive audience. In *Va. Pharmacy Bd.*, *supra*, and *Bates*, *supra*, the Court reaffirmed time, place, and manner restrictions in the context of advertising for professionals. Moreover, in *Bates*, *supra*, the court specifically recognized the necessity for such restrictions in regard to solicitation of clients.<sup>65</sup> Even if, as Appellant contends, the ACLU's legal activities are similar to those of the NAACP in *NAACP v. Button*, *supra*, that decision did not permit the method of solicitation used in this case, *i.e.*, a personal letter of solicitation written to the prospective client at her home. In *Button*, the NAACP secured clients in two ways: first, through requests directly from the aggrieved party, and secondly, through meetings held by the NAACP and voluntarily attended by its members. Such methods are obviously less obtrusive and do not violate the individual's privacy. In *Rowan v. United States Post Office*, 397 U. S. 728, 736, 90 S. Ct. 1484, —, 25 L. Ed. 2d 736, 742-3 (1970), the Court stated:

[T]he right of every person "to be let alone" must be placed in the scales with the right of others to communicate.

<sup>64</sup> See also, *Cox v. New Hampshire*, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049 (1941) (parades and processions on public roads); *Breard v. Alexandria*, 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951) (door-to-door salesmen); *Poulos v. New Hampshire*, 345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105 (1953) (public park); *Adderly v. Florida*, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966) (jailhouse); *Columbia Broadcasting v. Democratic National Committee*, 412 U. S. 94, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973) (broadcasting facilities).

In *Olmstead v. United States*, 277 U. S. 438, 478, 48 S. Ct. 564, —, 72 L. Ed. 944, 956 (1928), the Court observed that the makers of the Constitution in undertaking to secure conditions favorable to the pursuit of happiness conferred upon the citizens "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."

<sup>65</sup> *Bates v. State Bar of Arizona*, — U. S. —, 97 S. Ct. —, 53 L. Ed. 2d 810, 825 (1977).



In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. . . . It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.

\* \* \*

Nothing in the Constitution compels us to listen or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

Thus, the Appellant, even if protected under *Button*, was restricted by the disciplinary rules, which specifically incorporated the prior decisions of the Court, to the same method of solicitation.<sup>66</sup> As previously noted, Appellant completely advised Mrs. Williams of her rights at the July meeting and even informed her that the ACLU was an organization that could render the legal services to her (App. 131). When Mrs. Williams informed Appellant that she would call Appellant if she needed a lawyer (App. 74), Appellant should have ceased her efforts to secure Mrs. Williams as a client. Her subsequent letter of August 30, 1973, violated the disciplinary rules which limit the methods of recommending a particular lawyer and is outside the scope of the First Amendment.

<sup>66</sup> DR 2-103(D) (5) provides for solicitation on behalf of legal services organization "only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services. . . ."

## B. Compelling State Interests

Freedom of speech and association as protected by the First and Fourteenth Amendments are not "absolutes," and whenever these constitutional protections are asserted against the exercise of valid governmental powers, the Court must weigh the respective interests involved. *Konigsberg v. State Bar of California*, 366 U. S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961). Therefore, we must determine by a "balancing act" whether a legitimate and compelling state interest outweighs the alleged harm to the furtherance of a potential freedom. *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). If the Court should find that Appellant's solicitation falls within the scope of the First Amendment, her conduct must be considered "commercial speech" and not "pure speech" as contended by Appellant. The solicitation in this case involved neither editorial criticism of the legal system, *Bridges v. California*, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941), nor a public demonstration of protest, *Cox v. Louisiana*, 379 U. S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965), it was, in the light most favorable to Appellant, merely a proposal of a commercial transaction. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U. S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); *Bates v. State Bar of Arizona*, — U. S. —, 97 S. Ct. —, 53 L. Ed. 2d 310 (1977). As Appellant characterized her own conduct, she was seeking members of a plaintiff class as clients for the ACLU (App. 136-7).

The Court's concern that aggrieved parties have information regarding their legal rights and the means for effectuating those rights has not gone unnoticed by the bar.<sup>67</sup> Many programs, such as lawyer referral services and legal aid offices, have been created to meet these needs.

<sup>67</sup> See, e.g., *Bates v. State Bar of Arizona*, — U. S. —, 97 S. Ct. —, 53 L. Ed. 2d 810, 832, fn. 22 (1977).



Likewise, last term in *Bates*, *supra*, this Court gave First Amendment protection to advertising of **routine** legal services by attorneys, which will increase the information available to the public in regard to legal services. But, as the Court in *Goldfarb v. Virginia State Bar*, *supra*, noted,<sup>68</sup> not all forms of competition usual in the business world are appropriate in a profession. Moreover, the state, in attempting to preserve the quality of legal services rendered by attorney as well as protecting the public's safety and welfare, should be allowed reasonable opportunity to experiment with solutions to providing better information to the public about legal services through means other than personal solicitation. See, *Young v. American Mini Theaters*, 427 U. S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976). We therefore turn to the compelling state interests which justify the restraints on personal solicitation of legal business.

### 1. Undue Influence and Overreaching<sup>69</sup>

Solicitation by lawyers will encourage people to select lawyers for the wrong reasons, *i.e.*, reasons not related to competence and integrity of the lawyer being selected. Thus, as previously noted, parties may select a lawyer on the basis of who gets there first or who makes the best sales pitch. Moreover, people may decide to undertake legal services they do not need and cannot afford because of high pressure tactics, or even to get rid of an annoying attorney. It is the State's position that a lawyer should not be retained as the result of hucksterism normally attendant to the sale of a vacuum cleaner. In *Bates*, the Court specifically recognized the problem of undue influence bred by

<sup>68</sup> 421 U. S. 773, 792, 95 S. Ct. 2004, —, 44 L. Ed. 2d 572, 585 (1975).

<sup>69</sup> "Overreaching" refers to the aggressive competition among lawyers for clients which leads to lawyers approaching clients at times when the client is in no condition to properly consider retention of a lawyer.

personal solicitation.<sup>70</sup> The experience of the business world supports this concern. In 1970, the Federal Trade Commission held hearings as the result of "substantial" complaints arising out of the "home solicitation sale."<sup>71</sup> Consumer complaints fell within five basic areas:

- (1) Deception by salesmen in getting inside the door;
- (2) high pressure sales tactics;
- (3) misrepresentation;
- (4) high prices for low quality merchandise; and
- (5) the nuisance created by the visit to the home by an uninvited salesman;<sup>72</sup>

In regard to the high pressure sales tactics, the hearing officer found:

High pressure sales tactics are the leading cause for consumer complaints about door-to-door selling. The use of such tactics is of course present in all forms of selling. The door-to-door sale, however, seems to be particularly susceptible to the use of these tactics. While various forms of misrepresentation may be utilized in the door-to-door sale, high pressure sale techniques are almost always used. This explains the high degree of success of the glib, fast-talking, and persistent door-to-door salesmen in selling a product which the customer often does not want, or does not need, or cannot afford.<sup>73</sup>

While badgering and physical coercion have sometimes been used in solicitation, the use of more subtle or sophisticated techniques of psychological coercion are equally effective.<sup>74</sup> Moreover, the context of the personal solicitation is more conducive to undue influence, since such solicitation takes place in the home, in the hospital, at the scene of

<sup>70</sup> *Bates v. State Bar of Arizona*, — U. S. —, 97 S. Ct. —, 53 L. Ed. 2d 810, 825 (1977).

<sup>71</sup> See, 37 Fed. Reg. 22934 (1972).

<sup>72</sup> *Id.* at 22937.

<sup>73</sup> *Id.* at 22937-8.

<sup>74</sup> See, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. Law Review 890, 895 (1969).

accident, or other locations where the client cannot easily leave and must take affirmative action to relieve himself of the attorneys' presence.<sup>75</sup> Minority groups, indeed the very group the First Amendment seeks most to protect, are the most susceptible group to pressure tactics.<sup>76</sup> Because personal solicitation results in a captive audience, it deprives the "consumer" of the right to reflect, compare, decide, and if desired, walk away. Moreover, personal solicitation at home or at other places where pressure tactics are prevalent normally results in excessive prices for the goods or services rendered<sup>77</sup>—a fact deemed undesirable by the Court in *Bates*.<sup>78</sup>

The record in this case establishes the pressure being placed upon Mrs. Williams to file suit. Certainly, Appellant's emphasis on money damages both in her initial interview and subsequent letter was calculated for its psychological effect on Mrs. Williams, a poor and uneducated individual (App. 70).<sup>79</sup> The letter was received at her home during a time when her child was critically ill in the hospital, a fact that Appellant was aware of (App. 42) and which would obviously make informed decision-making more difficult.<sup>80</sup> The pressure on Mrs. Williams almost resulted in her filing suit to keep from being "bothered" (App. 57).

<sup>75</sup> *Id.* at 896.

<sup>76</sup> *Id.* at 922. The FTC hearing officer also concluded that high and middle income consumers are also prime targets for personal solicitation.

<sup>77</sup> 37 Fed. Reg. 22939.

<sup>78</sup> *Bates v. State Bar of Arizona*, \_\_\_\_ U.S. \_\_\_\_, 97 S. Ct. \_\_\_\_, 53 L. Ed. 2d 810, 832 (1977).

<sup>79</sup> The letter contained all of the elements of a sales pitch (App. 3):

- (1) the creation of a need;
- (2) the receipt of something for nothing;
- (3) the obscuring of the actual cost;
- (4) a strong closing action.

*The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. Law Review 890, 906 (1969).

<sup>80</sup> For example, Mrs. Williams could have blamed her doctor for the child's illness, a factor unrelated to the issue of sterilization.

## 2. Conflicts of Interest

Personal solicitation of clients is not conducive to encouraging the kind of attorney-client relationship which the state can and should reasonably demand. While this conflict may traditionally derive from the element of pecuniary gain, it also often results in the context of legal service organizations. As observed by Mr. Justice Harlan:

When an attorney is employed by an association or corporation to represent individual litigants, two problems arise, *whether or not the association is organized for profit and no matter how unimpeachable its motives*. The lawyer becomes subject to the control of a body that is not itself a litigant and that, unlike the lawyer it employs, is not subject to strict professional discipline as an officer of the court. *NAACP v. Button*, 371 U. S. 415, 461, 83 S. Ct. 328, \_\_\_\_, 9 L. Ed. 2d 405, 434 (1963) (dissenting opinion). (Emphasis added.)

The Court in *Button* found no conflict of interest because, first, there were no monetary stakes and, secondly, the aims of the client and organization were identical. *NAACP v. Button*, 371 U. S. 415, 424, 83 S. Ct. 328, \_\_\_\_, 9 L. Ed. 2d 405, 424 (1963). Both of these elements are missing in the present case.

The ACLU, as shown by the record in this case, would have financially benefited from court awarded attorney fees (App. 188). Appellant would have been financially benefited<sup>81</sup> through "foundation" grants which require her involvement in such litigation (App. 144-5). But of more importance in this case was the obvious lack of identity of aims and interests of the organization and its non-member potential client. The purpose of the ACLU is advancement of civil liberties (App. 183); the interests of the potential

<sup>81</sup> Appellant's private law partner, who served also as a staff attorney for the ACLU, would have benefited financially, since court awards of attorneys fees are used among other things to pay the salaries of staff attorneys.



client was no doubt to recover money damages (App. 70). It is easy to see, for example, that a monetary settlement, while satisfactory to the client, might not be satisfactory to the organization, which is more concerned with setting "civil liberties legal precedents of broad effect" (App. 177). There is always the danger that important individual causes of action which do not further the purposes of the organization will be omitted or subordinated to issues of more interest to the organization.<sup>82</sup> A cause of action in tort may be obscured in order to promote the civil liberties issue, to the disadvantage of the client.<sup>83</sup> The danger that the organization will control the litigation or interfere in the attorney-client relationship is apparent in instances where, as in this case, the organization's main efforts are exerted through litigation.<sup>84</sup> The State cannot be foreclosed from its legitimate interest in protecting the public from such conflicts of interest merely by an organization's policy, written or unwritten, providing that the attorney's

<sup>82</sup> The ACLU Policy Guide (1976) referred to by Appellant in her Brief (pp. 26, 52) also provides in Policy No. 513 that:

In the direct representation of plaintiffs in affirmative suits, it is generally possible to specify the issues that will be raised in advance, and as condition of the organization undertaking to provide legal representation. The issues can often be defined and limited from the start; the case can be so shaped as to point up the civil liberties issues and avoid extraneous ones in a way not ordinarily available in defensive cases; and it is often possible to secure affirmative relief which will be of broad effect. (Emphasis added.)

<sup>83</sup> For example, in the subsequent litigation by the ACLU on behalf of two women who had been sterilized, *Doe v. Pierce*, No. 74-475 (D.S.C. 1974), the complaint contained a cause of action for malpractice. (Complainant's [Appellee's] Exhibit No. 2 to Panel Hearing (Not printed in Joint Appendix)). This cause of action, however, was dropped prior to trial.

<sup>84</sup> On April 15, 1974, the date the complaint in *Doe v. Pierce*, *supra*, was filed, the President of the South Carolina chapter of the ACLU and Appellant held a press conference in Columbia, South Carolina at which time the press release attached as an exhibit to the Deposition of Eldon D. Wedlock, Jr., Respondent's [Appellant's] Exhibit #2 to Panel Hearing (Not Reprinted in Joint Appendix). The press release stated, *inter alia*, that: "The American Civil Liberties Union today sued Dr. Clovis H. Pierce and Aiken County Hospital and four persons acquiescing or assisting the practice of compulsory sterilization." (Emphasis added.)

judgment must be governed by the client's interest and not the organization's.<sup>85</sup>

### 3. "Stirring up" Litigation

In urging this justification we do not view litigation as an evil which should be avoided. *NAACP v. Button*, *supra*. Nor is it asserted solely to deter those who might urge recourse to the courts solely for private gain<sup>86</sup> or for malicious intent, although the Court has recognized the legitimacy of restraints on such activities. *NAACP v. Button*, 371 U. S. 415, 440, 83 S. Ct. 328, —, 9 L. Ed. 2d 405, 422 (1963). Of more immediate concern is the prevention of solicitation by organizations or individuals who have no standing to initiate the litigation themselves and, therefore, seek plaintiffs merely to obtain access to the courts.<sup>87</sup> The state's interest in preventing the stirring up of litigation is especially great when, as here, the litigation would interfere with established relationships.<sup>88</sup>

### 4. Misleading

The Court in *Bates* recognized that advertising which is false, deceptive, or misleading is subject to restraint. — U. S. —, 97 S. Ct. —, 53 L. Ed. 2d 810, 835 (1977). Certainly, solicitation which results in false, deceptive or misleading information can likewise be restrained. Moreover, the court in *Bates* limited permissible advertising

<sup>85</sup> Appellant's Brief, page 52, fn. 1.

<sup>86</sup> The majority in *NAACP v. Button* noted the traditional condemnation of a lawyer urging private litigation for personal gain. The record in this case does establish that the ACLU and Appellant would financially benefit from the proposed litigation.

<sup>87</sup> Mr. Justice Harlan in his dissenting opinion in *NAACP v. Button*, 371 U. S. 415, 436, 83 S. Ct. 328, —, 9 L. Ed. 2d 405, 436 (1963), stated:

[T]he state policy is not unrelated to the federal rules of standing — the insistence that federal court litigants be confined to those who can demonstrate a pressing personal need for relief.

<sup>88</sup> Dr. Clovis H. Pierce was a private physician who had delivered Mrs. Williams' children. At the time of Appellant's letter, both she and her child were under his care (App. 60). As a result of the action in *Doe v. Pierce*, Civ. No. 74-475 (D.S.C.), Dr. Pierce will no longer accept Medicaid patients. *Walker v. Pierce*, 560 F. 2d 609, 612 (1977).



by attorneys to **routine** legal services, recognizing that more complex services are unique and thus likely to be inherently misleading. *Id.* at 828.

It is submitted that solicitation does not provide any foundation for the prospective client to select an attorney and therefore is inherently misleading. Solicitation will result in the creation of "images" and the use of subtle, or even overt, "puffing" by the attorney, a tactic that not only would mislead the client but also would be virtually impossible for the state to regulate.<sup>80</sup> See, *Bates v. State Bar of Arizona*, *supra*, at 829-30. The soliciting attorney will emphasize the benefits of his retention while down-playing its drawbacks until the client is "bagged."<sup>80</sup>

The letter of solicitation in this case was misleading not so much by what it said, but for what it did not say. Initially, it should be noted that it did not inform Mrs. Williams that the ACLU would render the legal services free, as contended by Appellant. Besides being written on the stationery of Appellant's law firm and signed by Appellant as attorney-at-law, a fact that would mislead the reader to believe that the Appellant would be Mrs. Williams attorney,<sup>81</sup> the letter failed to provide Mrs. Williams with in-

<sup>80</sup> One need only consider the many tactics used by salesmen in the business world, the "loss leader", "bait and switch", "something for nothing", etc. to realize that permitting solicitation would open the door to problems that will be impossible for the courts to cope with.

<sup>80</sup> Studies conducted under the auspices of the American Bar Foundation reveal that most complaints against attorneys are the result of flaws in the attorney-client contract or alleged deficiencies in the attorney's performance under that contract. See, *Lawyers, Clients, and Professional Regulation*, ABF Research Journal 919 (1976). As to performance of attorneys under system permitting solicitation refer to paragraph 6, *infra*.

<sup>81</sup> Mrs. Williams was under the impression that Appellant would be her lawyer (App. 32), a fact denied by Appellant (App. 94). But even statements which are true and not intended to deceive can be inherently misleading. For example, Appellant informed Mrs. Williams that a Mrs. Waters, an acquaintance of Mrs. Williams, had already requested the ACLU to file suit. Mrs. Williams might make the unwarranted inference from this statement that Mrs. Waters had determined that the attorneys for ACLU were especially competent to handle her case.

formation of what would be accomplished by the lawsuit other than recovery of money damages (*See*, App. 70). But, the most important omission in the letter was failing to advise Mrs. Williams of the potential conflict of interest —i.e., that Mrs. Williams might have to forego or subordinate other causes of action to her "civil liberties" remedies.<sup>92</sup>

### 5. Undesirable Effects on the Quality and Costs of Legal Services

In *Cohen v. Hurley*, 366 U. S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961), the Court recognized that it was a legitimate state concern that attorneys not devote so much time to the "business" of getting clients that he neglects his duties to the court. Solicitation will make it possible for attorneys who are not competent and do not enjoy a good reputation to subsist through "one time" clients. Solicitation not only discourages competence and skill among attorneys, but also deprives present clients of the attorney's time best spent in legal research and in court.<sup>93</sup>

Moreover, by permitting an aggressive attorney to secure an unsophisticated client with an early retainer con-

<sup>93</sup> The record does not indicate any incompetence by Appellant as an attorney. Nevertheless, the argument that skill and competency are fostered by a system whereby the attorney is sought by the client, rather than the client by the attorney, does not lose any of its vitality in the context of legal services organizations. Recently, the Court recognized the interest of the State in maintaining the quality of medical care provided within the State. *Bigelow v. Virginia*, 421 U. S. 809, 827, 95 S. Ct. 2222, —, 44 L. Ed. 2d 600, 615 (1975). It is submitted that the State's interest in the quality of legal services rendered to its citizens is no less compelling.

<sup>92</sup> See, footnote 78, *supra*. In *Va. Pharmacy Bd.*, *supra*, the Court recognized that physicians and lawyers do not dispense standardized products, thus the dangers of abuse and deception may be greater. The Court further stated that such dangers would be greater at the professional judgment level, as for example when a drug is prescribed by a physician, than on the sales level when dispensed by a licensed pharmacist. Likewise, the dangers of abuse are greater when the solicitation is undertaken by attorneys, rather than, for example, non-legal services organization, such as the lawyer referral services in *Brotherhood of R. Trainmen*, *United Mine Workers*, and *United Transportation Union*, *supra*.

tract, solicitation would even have an anti-competitive effect. If the prospective client is contacted at his home, the hospital, or the accident scene, he would probably select an attorney by "who gets there first." Since he is unable in such contexts to ascertain the fees charged by other attorneys for such services, he may end up paying more for the legal services.<sup>94</sup> Although this aspect may be of limited importance in the case of an organization offering free legal services to clients, it must be realized that the organization's attorneys fee will be in many instances paid by another consumer—the opposing party in litigation.

### 6. Invasion of Privacy

As discussed in Part A of this Argument, personal solicitation invariably involves the invasion of the privacy of the prospective client and results in the solicitor's message being thrust upon him as a captive audience.<sup>95</sup> *Breard v. Alexandria*, 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951); *Lehman v. City of Shaker Heights*, 418 U. S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974); *Rowan v. United States Post Office*, 397 U. S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970). Surveys of consumer attitudes toward home solicitation indicate that unannounced and uninvited personal solicitation was considered an unwarranted invasion of privacy.<sup>96</sup>

<sup>94</sup> This conclusion is supported by the experience in the business world. The Federal Trade Commission in its hearings found that excessive prices were charged for products sold in the home. 37 Fed. Reg. 22939.

<sup>95</sup> See text accompanying footnote 63, *supra*.

<sup>96</sup> *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. Law Review 890 (1969). In the FTC hearings in 1972, the hearing officer reported that "[t]he nuisance occasioned by the unannounced and uninvited call has long been recognized and regulated by local authorities." 37 Fed. Reg. 22938.

As compendiously put by Professor Zechariah Chafee in his work, *FREE SPEECH IN THE UNITED STATES*,

Of all the methods of spreading unpopular ideas [home solicitation] seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires. *Id.* at 406.

In this case, Appellant's uninvited<sup>97</sup> letter of solicitation, was received as an unwarranted invasion of Mrs. Williams' privacy (App. 57).

### 7. Adverse Effects on the Administration of Attorney Discipline

In view of the sheer size of the profession, the existence of a multiplicity of jurisdictions, and the problems inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement has proven to be extremely difficult. *Bates v. State Bar of Arizona*, —U.S.—, 97 S. Ct., —, 53 L. Ed. 2d 810, 844 (1977) (dissenting opinion).

The above observation of Justice Powell in *Bates, supra*, no matter how dramatic it seems, can only be considered an **understatement**. At a time when the existing machinery of professional discipline for attorneys has been challenged as inadequate,<sup>98</sup> the Court is now asked to permit the practice of solicitation by attorneys. While published advertising could give some tangible means for effectively policing its content, personal solicitation, often in the presence of only the client, would make it impossible to determine if

<sup>97</sup> Not only had Mrs. Williams not requested Appellant's services (App. 34, 138), she had advised Appellant that she would contact Appellant if legal services were needed (App. 74).

<sup>98</sup> See, e.g., ABA Special Committee on Evaluation of Disciplinary Enforcement (Clark Report, June 1970).



the client was misled, or his interests subordinated or abandoned. Appellant argues that a distinction can be drawn between solicitation on the basis of whether a fee is involved. No such simplistic approach can be taken for it obviously overlooks many other shortcomings involved in solicitation by attorneys. Certainly not all lawyers will mislead, overreach, or subordinate the interests of their clients. However, the state does have the right and the legitimate interest in restraining methods of competition which will cause an undue burden on disciplinary enforcement especially when more appropriate means exist to inform the public of the availability of legal services.

### 7. Professionalism

The Appellant dismisses as speculative the state's interest in preserving the dignity of the profession. Regardless of whether one feels the majority in *Bates, supra*, gave appropriate consideration to this compelling interest, a re-examination is mandated for the more pressing question involved with solicitation. One commentator of the current "image" of the legal profession observed:

The legal profession is currently the subject of controversy and criticism. Individual attorneys are often described as unethical and incompetent, while the bar is portrayed as politically partisan, captive of economic interests, and unresponsive to the public interest. Public opinion polls document disrespect for attorneys as a group. Local and national scandals highlight criminal acts of prominent attorneys. The cost, quality, and availability of legal services are matters of public debate. E. Steele and R. Nimmer, *Lawyers, Clients, and Professional Regulation*, 3 ABF Research Journal 919-20 (1976).

We do not intend to restate the rather extensive argument made to the Court in *Bates*. While the assertion that advertising will diminish the reputation of the profession may

have been open to question, that result is assured if the Court overrules the prohibition against solicitation.<sup>99</sup>

A client who has been overreached, misled, charged a high fee, or had his interests subordinated to the interest of the attorney is likely to circulate uncomplimentary remarks about the profession. When the public loses confidence in the bar, a doubt is created in the integrity of the court.

## II

### The Disciplinary Rules are not vague or overbroad.

As previously noted, the South Carolina Supreme Court found that Appellant had violated Disciplinary Rules 2-103(D)(5) (a) and (c) and 2-104(A)(5) of the ABA Code of Professional Responsibility. The first rule, DR 2-103(D)(5) (a) and (c) prohibits a lawyer who assists or cooperates with a non-profit organization that furnishes or pays for legal services to its members or beneficiaries, from recommending to a non-lawyer that he retain the organization's lawyers if: 1) the organization has a primary purpose of rendering legal services, or 2) the organization derives financial benefit from rendering the legal services. The second rule, DR 2-104(A)(5), prohibits a lawyer who has given unsolicited legal advice to a member of the public from subsequently *seeking* that person as a member of a plaintiff class. Appellant argues that these disciplinary rules are vague and overbroad.

#### A. Vagueness

Appellant argues that DR-2-103(D)(5)(a) and (c) and DR 2-104(A)(5) are vague in that they do not give fair notice of the conduct proscribed. Appellant maintains, for

<sup>99</sup> In a survey of solicitation practices in the business world, it was noted that even where product dissatisfaction was relatively low, consumers expressed an extremely negative attitude toward personal solicitation. *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. Law Review 890 (1969).



example, that DR 2-103(5)(a) and (e) only prohibit an attorney from allowing an organization to promote his own services (J. S. 16). This construction ignores the plain language of that statute which provides:

A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services *or those of his partners or associates*. (Emphasis added.)

The Appellant further argues that the words "primary" in DR-2-103(D)(5)(a) and "financial benefit" in subsection (e) are impermissibly vague.<sup>100</sup> But words necessarily contain germs of uncertainty. *Broadrick v. Oklahoma*, 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). In *CSC v. Letter Carrier*, 413 U. S. 548, 578-9, 93 S. Ct. 2880, —, 37 L. Ed. 2d 796, 816 (1973), the Court stated:

[T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Moreover, in discussing DR 2-104(A)(5), Appellant maintains that this disciplinary rule only prohibits the *acceptance* of employment and does not prohibit seeking out a client to be a party to the litigation. Again, Appellant has ignored the plain language of that DR which provides that

<sup>100</sup> Appellant's Brief, page 76. It seems somewhat incongruous for Appellant as an attorney to argue that the phrase "to the extent that controlling constitutional interpretation . . . requires" in DR 2-103(D)(5) is vague.

<sup>101</sup> See, ABA Informal Opinion No. 1234 which held that a "legal aid lawyer who desires to raise certain issues in litigation but who is handling no litigation involving such issues may not seek out indigents and request the indigents to, or advise the indigents to, become, as clients, parties to the litigation." The opinion found that such conduct violated provisions of DR 2-104(A) and DR 2-103(D).

"... a lawyer may accept, but shall not seek. . . ." <sup>101</sup> Appellant attempts to avoid the plain language of these disciplinary rules by discussing them in the abstract. By avoiding the plain language of the rules and instead placing an obtuse interpretation on their terms, Appellant has attempted to show that the rules are vague and indefinite.

It is evident that the disciplinary rules in question are not so vague that "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926). It is all but frivolous to suggest that the disciplinary rules fail to give adequate warning of the activities they proscribe or to set out explicit standards for those that must apply the rule *Broadrick v. Oklahoma*, 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). In the instant case, Appellant's conduct falls within the "hard core" of the disciplinary rules' prohibitions. By her own testimony Appellant was attempting to solicit Mrs. Williams as a member of the plaintiff class for a class action suit which the ACLU desired to bring. Moreover, this solicitation was performed on behalf of an organization which stood to gain financially from rendering this service. Appellant's contention that the disciplinary rules are void for vagueness is clearly erroneous and unsubstantial.

### B. Overbreadth

The traditional rule governing constitutional adjudication is that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others or in other situations not before the court. *Broadrick v. Oklahoma*, 413 U. S. 601, 610, 93 S. Ct. 2908, —, 37 L. Ed. 2d 830, 839 (1973). The Court has, however, permitted special overbreadth attack, regardless of whether the person's own conduct could be regulated by a more nar-

rowly drawn statute, because of the danger of tolerating, in the area of First Amendment freedoms, an overly broad statute susceptible to a sweeping and improper application. *See, Bigelow v. Virginia*, 421 U. S. 809, 816, 95 S. Ct. 2222, —, 44 L. Ed. 2d 600, 608 (1975). Thus, an overly broad statute might serve to "chill" protected speech. *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). Nevertheless, facial overbreadth has been recognized "as strong medicine" which should be employed sparingly by the court. *Broadrick v. Oklahoma, supra*. The Court has also recognized that different forms of speech under the First Amendment may warrant a different degree of protection. For example, commercial speech, which is more durable than other kinds of speech, may require less protection since there is little likelihood that it will be chilled. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U. S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). Last Term, recognizing that the overbreadth analysis applied weakly, if at all, in the area of commercial speech, the Court declined to apply it to professional advertising by attorneys. *Bates v. State Bar of Arizona*, — U. S. —, 97 S. Ct. —, 53 L. Ed. 2d 810, 834 (1977). The solicitation in the instant case did "no more than propose a commercial transaction." *Va. Pharmacy Bd. v. Va. Consumer Council, supra*; *Bates v. State Bar of Arizona, supra*. The overbreadth doctrine, therefore, should not be applied in the instant case.

### III

**The Appellant was given fair notice of the misconduct charged and the evidence does support the findings of misconduct.**

#### A. Fair Notice

Appellant contends that she was denied due process of law in that the complaint did not provide her with sufficient notice of the conduct charged. In support of this contention, Appellant relies heavily on the case of *In Re Ruffalo*, 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117, *reh. den.*, 391 U. S. 961, 88 S. Ct. 1883, 20 L. Ed. 2d 874 (1968). In *Ruffalo*, an Ohio Attorney, who had been charged with soliciting through an agent, defended against this charge by personally testifying that he had merely hired the individual to investigate cases, including cases against the agent's other employer. At the conclusion of his testimony, Bar counsel amended his complaint to further allege that attorney Ruffalo was guilty of unethical conduct by hiring an individual to investigate that individual's employer. No additional evidence was taken on the matter. The Supreme Court subsequently found that Ruffalo had engaged in unethical conduct, including the latter charge. This Court found that Ruffalo had no notice that his hiring the agent would be an ethical violation until after he and the agent had testified. The Court went on to hold that a disciplinary proceeding was quasi-criminal in nature; therefore, the attorney must have fair notice of the charges made and be afforded opportunity for explanation and defense.

In the instant case the complaint charged Appellant with solicitation and attached a copy of Appellant's letter of August 30, 1973, which provided that details of the misconduct charged (App. 1-4.). Appellant did not allege insufficient notice in answering the complaint (App. 18-20), made no motion to make the complaint more definite and



certain at any point during the hearing (J.S.A. 8a),<sup>102</sup> informed the panel before the hearing that she was familiar with the charge in the complaint (App. 28), and even utilized witnesses who testified with obvious knowledge of the specific disciplinary rules involved in the complaint (App. 168-9, 183-4). In *Ruffalo, supra*, the Court stated:

The charge must be known before proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused.<sup>103</sup>

The complaint in this case was never amended to allege any new charges, and Appellant was given full opportunity to be heard on the solicitation charge.

Appellant contends that she did not receive adequate notice of the charge in that no disciplinary rules were specified in the complaint. In the case of *Burns v. Clayton*, 237 S. C. 316, 333, 117 S. E. 2d 300, 308 (1960), the South Carolina Supreme Court stated:

Technical formality of allegation, as in an indictment, is not required in proceedings such as the present. All that is requisite to their validity is that the respondent be clearly apprised of the charges, i.e., the facts upon which the claim of misconduct is founded, and that he

<sup>102</sup> The failure to raise objection has been held to bar an attorney from complaining of lack of notice under *Ruffalo, supra*. *Louisiana State Bar Association v. Jacques*, 260 La. 803, 257 So. 2d 413 (1972).

<sup>103</sup> It is interesting to note the observation of the Maryland Court of Appeals in *Bar Association of Baltimore v. Cockrell*, 274 Md. 279, 334 A. 2d 85, 88-9 (1975):

In reviewing this recommendation, we note initially that if *Ruffalo* is strictly applied as it literally reads, then its broad holding would have a crippling effect on the primary purpose of disciplinary proceedings which, as we have held, is "not for punishment, but rather [is] a catharsis for the profession and a prophylactic for the public." [Citations of authority omitted.] For example, if *Ruffalo* means in all cases what its words seem to indicate, once an attorney is brought before a disciplinary tribunal for some minor offense he can take the stand and make known every other professional indiscretion (perhaps even those of a more serious nature) he ever perpetrated and, in this way, immunize himself from any potential professional censorship for them. Because, under *Ruffalo*, "due process" would prevent an amendment of the initial allegations.

be afforded reasonable opportunity for explanation and defense.<sup>104</sup>

Under this standard, it is obvious that the Appellant was sufficiently informed of the nature of the charge against her. The complaint charged the Appellant with misconduct in the form of solicitation in violation of the Canons of Ethics. In addition, a copy of the letter which the Appellant wrote was attached to the complaint to inform Appellant of the set of facts on which the solicitation charge was based. The fact that the complaint did not specify the particular disciplinary rules that Appellant violated does not render the complaint invalid.<sup>105</sup> The Supreme Court of New Jersey in *In Re Kamp*, 40 N. J. 588, 194 A. 2d 263 (1963), rejected the argument advanced by the Appellant when it held that the New Jersey Supreme Court Rule mandating that every complaint in a disciplinary action against an attorney contain "the facts constituting the alleged misconduct on the part of the attorney" did not extend so far as to "require that the complaint specify the particular canon or canons allegedly violated." 194 A. 2d at 242.<sup>106</sup>

<sup>104</sup> In *Seventh District Committee of the Virginia State Bar v. Gunter*, 212 Va. 278, 183 S. E. 2d 713 (1971), a similar finding was made by the Virginia court:

"A proceeding to discipline an attorney is not a criminal proceeding and the purpose is not to punish him but to protect the public. It is a special proceeding, civil and disciplinary in nature, and of a summary character. It is in the nature of an inquest or inquiry as to the conduct of the attorney. Being an informal proceeding it is only necessary that the attorney be informed of the nature of the charge preferred against him and be given an opportunity to answer." 183 S. E. 2d at 717.

<sup>105</sup> The complaint charged Appellant with solicitation, a charge to which only one canon of the Code of Professional Responsibility addresses itself—that being Canon 2. Canon 2 has only two disciplinary rules, which apply to solicitation by lawyers, DR 2-103 and DR 2-104. The court below found that Appellant violated both of these disciplinary rules.

<sup>106</sup> The Preamble of the Code of Professional Responsibility notes that it would be impossible for any code to particularize all of the duties of a lawyer. The enumeration of particular duties should not be construed as a denial of others equally imperative though not specified.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of difficult tasks. Not every situation can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these



Appellant, relying on *In Re Buffalo, supra*, for the proposition that a disciplinary proceeding is of a quasi-criminal nature, has cited several criminal cases to support her contention that the complaint should have specified the disciplinary rules violated.<sup>107</sup> Utilizing this proposition, it is interesting to note that the federal courts have consistently held that it is the statement of facts in a criminal indictment and not the statutory citation that is determinative of the indictment's validity. *United States v. Bethany*, 489 F. 2d 91, 93 (5th Cir. 1974); *United States v. Malicote*, 531 F. 2d 439, 440 (10th Cir. 1975).

#### B. The Evidence Supports the Finding of Misconduct.

With respect to DR 2-103(D)(5)(a) and (c), the court below found that Appellant who acted as cooperating attorney for the ACLU as well as Vice-President of the South Carolina Chapter, had solicited a client on behalf of the ACLU, an organization which has a primary purpose of rendering legal services and which would financially benefit in the event of successful prosecution of the suit for money damages (J.S.A. 6a; App. 188). The court noted that the Appellant's law partner was a staff attorney for the ACLU whose salary was paid out of a central fund into which awards of attorney fees are deposited (J.S.A. 10a). The Court also noted that her law partners were counsel of record in the subsequent litigation which arose out of these events (J.S.A. 3a).<sup>108</sup> It is obvious that Appellant's letter was promoting the use of the ACLU's legal staff, which included herself, her private law partners, and other law-

principles, a lawyer must with courage and foresight be able and ready to shape the body of law to the ever changing relationships of society.

See also, Preamble and Preliminary Statement, *Code of Professional Responsibility*, footnote 4, page 1.

<sup>107</sup> Appellant's Brief, page 68.

<sup>108</sup> See, footnotes 2 and 3, *supra*.

yers who associate or cooperate with the ACLU.<sup>109</sup> The evidence amply established a violation of this disciplinary rule.

With respect to DR 2-104(A)(5), the Court found that the disciplinary rule prohibited solicitation of clients for joinder in a class action (J.S.A. 92). By Appellant's own testimony, this was the purpose of her letter (App. 136-7). Appellant's contention that the ACLU did not already have a client for their proposed lawsuit with whom they sought to join Mrs. Williams is refuted by Appellant's letter itself (App. 4). Again, the record amply establishes a violation of DR 2-104(A)(5).

#### CONCLUSION

For the foregoing reasons, the Order and Judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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<sup>109</sup> Appellant's contention that there was a stipulation at the hearing that the ACLU was a "legal aid office" or "public defender office" is frivolous. The only "stipulation," if any, was as to the witness's testimony that "the purpose of the ACLU is to advance and defend the cause of civil liberties under the protection of the United States Constitution" (App. 183).

JAN 11 1978

WILLIAM RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977  
**No. 77-56**

IN THE MATTER OF EDNA SMITH,

*Appellant.*

ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF SOUTH CAROLINA

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## Introduction

The case briefed by South Carolina, the appellee, is not the case before this Court. Numerous "facts" relied on by the state appear nowhere in the record. Other facts are distorted or ignored. Even so, the basic facts in this case are still not in dispute. Of the six key facts summarized in appellant's brief at 8-9, appellee accepts five, and disputes (unsuccessfully, as we point out infra), only the sixth.<sup>1/</sup> Under controlling decisions of this Court, those undisputed facts require reversal of the decision below.

<sup>1/</sup> Appellee's brief does not dispute the following five facts set forth in appellant's brief at 8-9:

(1) Appellant Edna Smith was invited by Gary Allen, a local businessman, to attend a meeting of poor, black Medicaid mothers to discuss their constitutional rights concerning forced or unwanted sterilization as a condition for continuing to receive Medicaid assistance.

(2) At that meeting, appellant met Mrs. Marietta Williams, who had undergone a sterilization operation.

(3) Thereafter, appellant was contacted by Allen, who told her that Mrs. Williams wanted a lawyer to represent her [Footnote Continued]

Indeed, appellee now concedes, for the first time, that "Appellant's conduct in meeting with the women to advise them of their legal rights, even if such advice was unsolicited" was protected under the First Amendment and NAACP v. Button, 371 U.S. 415 (1963) (see Brief for Appellee at 30). That concession requires reversal, or at least a remand for clarification,

[Footnote 1 Continued]

in a suit for damages against the doctor who had sterilized her, but was unwilling to write to appellant.

(4) After conferring with the South Carolina ACLU, appellant wrote to Mrs. Williams and told her the ACLU (not appellant or her associates) "would like to file a lawsuit on your behalf for money damages against the doctor who performed the operation".

(5) Mrs. Williams eventually decided not to sue. Accordingly, no lawsuit resulted from the letter in question, and appellant had no further contact with Mrs. Williams.

because the opinion below seems clearly on its face to rely on both the "unsolicited advice" given at the Aiken meeting, and the "solicitation" letter of August 30th:

"Here, by respondent's own testimony, she met with Mrs. Williams in Aiken, gave unsolicited advice as to what her rights were as she, the respondent, saw them. Then respondent followed up with her letter of August 30, 1973, wherein she solicited Mrs. Williams to join in a class action suit for money damages to be brought by the ACLU." Appendix to Jurisdictional Statement at 9a. 2/

I. Appellee's "Factual" Assertions Find No Support In The Record, Or Are Exaggerated, Misleading and Taken Out of Context.

(1) Appellee seeks to distinguish NAACP v. Button, 371 U.S. 415 (1963) by

2/ Appellant's suggestion that the Court might vacate and remand the decision below is also supported by the fact that South Carolina did not have the benefit of this Court's decision in Bates v. State Bar of Arizona, U.S. , 97 S. Ct. 2691 (1977) when it considered this case. It would be appropriate for that court to assess its public reprimand in light of the analysis presented in Bates.



asserting that appellant and the ACLU "would" derive financial benefit from rendering legal services.<sup>3/</sup> The record provides no support for the assertion. At the time of the relevant events, it would have been impossible for plaintiffs in any suit such as the

<sup>3/</sup> Appellee's Brief at 29. As construed by the South Carolina Supreme Court, DR 2-103(D)(5)(a) and (c) prohibits

"a lawyer who assists or cooperates with a non-profit organization that furnishes or pays for legal services to its members or beneficiaries, from recommending to a non-lawyer that he retain the organization's lawyers if: 1) the organization has a primary purpose of rendering legal services, or 2) the organization derives financial benefit from rendering the legal services." Brief for Appellee at 49. Although the version of DR2-103(D) relied on by South Carolina was excised from the American Bar Association's Code of Professional Responsibility, in 1974, and replaced by a new rule, South Carolina has retained the former version. As is clear from the ABA's revision, DR 103(D) was never intended to regulate public interest legal organizations, but was designed to regulate group pre-paid legal services plans. See, e.g., DR2-103(D)(4)-(7). See also Brief for Amicus Curiae The State Bar of California, Appendix D. The ACLU would clearly qualify for an exemption under the ABA DR2-103(D).

one discussed by appellant to recover attorney's fees, absent an "extraordinary" showing. Bradley v. School Board of City of Richmond, 345 F. 2d 310, 321 (4th Cir. 1965). It was certainly not likely that the ACLU "would" receive such fees.<sup>4/</sup>

As for appellant, at the time of the events at issue here, Policy #512 of the American Civil Liberties Union provided that "[u]nder no circumstances may any cooperating attorney associated in any way with an ACLU or affiliate case receive payment for services rendered in such a case, whether as a fee or voluntary donation." Policy #512 was amended in 1977, to allow state affiliates, but not the national ACLU, to adopt a temporary policy on an experimental basis that would allow their

<sup>4/</sup> In addition, the panel repeatedly stressed that it was not "trying" the ACLU. It is therefore disturbing, and inconsistent with basic concepts of due process, to find the reprimand justified by appellee on the ground that appellant's recommendation to Mrs. Williams was improper because the ACLU "derived financial benefit from rendering legal services." Brief for Appellee at 49. See also App. at 10a.

cooperating attorneys to share in any court award of attorneys fees. The South Carolina affiliate, however, has never adopted such a policy. Moreover, the Court below did not find that appellant would be personally involved in any litigation resulting from the Aiken meeting or the August 30th letter, and there was no evidence that she could or even attempted to parlay her non-litigative educational efforts into foundation support for public interest litigation. Compare Brief for Appellee at 5.

(2) Appellee characterizes Mrs. Williams' testimony as stating that the letter was part of "a campaign to influence" her. Brief at 11. But the only attorney who asked Mrs. Williams whether she would "sign" anything in connection with a lawsuit, and who confronted her in person, was an attorney for Dr. Pierce.<sup>5/</sup> See Brief

<sup>5/</sup> The state relies heavily on appellant's alleged pressuring of Mrs. Williams, and infringement of her right of privacy. But it is undisputed that the only contacts appellant (or anyone under her direction or control) ever had with Mrs. Williams were the July meeting, which appellee now concedes was constitutionally protected  
[Footnote Continued]

for Appellant at 47 n. 1.

(3) Appellee repeatedly characterizes the letter as mere "commercial speech", and contends that "it merely recited the desire of the ACLU to bring a lawsuit on behalf of Mrs. Williams for money damages." Brief at 11. See also Brief at 33-34. According to appellee, since the letter "conveyed neither ideas or information, her conduct in writing the letter did not promote informed decision making,...and should not be afforded protection under the First Amendment." Brief, at 34. The text of the letter flatly contradicts those characterizations. The letter does not provide a dotted line for Mrs. Williams to sign,<sup>6/</sup> and does not even request immediate approval

[Footnote 5 Continued]  
activity, and the August letter, which contradicted evidence shows was written by appellant only after Mr. Allen told her that Mrs. Williams wanted legal representation. Certainly Allen's own contacts with Mrs. Williams cannot be charged to appellant: he was not an attorney, and was not associated professionally with either appellant or the ACLU.

<sup>6/</sup> Compare the release secured by Dr. Pierce's attorney, who has not been charged with overreaching. Brief for Appellant at 47 n. 1.

of the proposed litigation. Rather, it informs Mrs. Williams that appellant will, if Mrs. Williams so desires, "explain what is involved so you can understand what is going on." J.S. App. at 25a. The letter continues "I want you to decide", and states that appellant will "come down to talk" about the case if Mrs. Williams is interested. J.S. App. at 25a-26a. Clearly, the letter by its terms was an offer to meet and convey additional information relevant to the proposed litigation. In addition, the letter expressed the opinion that coerced sterilizations should be stopped, and proposed educational activities designed to create greater public awareness of the issue.

(4) Appellee sets forth eight allegedly compelling state interests to justify "the restraints on personal solicitation of legal business" which the reprimand supposedly vindicates. Brief at 38-49. But where in the record is there any evidence that appellant has been guilty of "personal solicitation" or "invading the privacy of

the home"? Appellee's Brief at 30.<sup>7/</sup> Appellee now concedes that appellant's conduct at the July meeting was constitutionally protected. The only other contact appellant had with Mrs. Williams was a single letter which, the uncontradicted evidence shows, appellant believed to have been requested by Mrs. Williams. App. 94, 96-97, 99, 123, 196. The undisputed facts conclusively demonstrate that appellant had no other contact with Mrs. Williams, and that as soon as she was informed that Mrs. Williams had no desire to litigate, she had no further contact with her.<sup>8/</sup>

<sup>7/</sup> Appellee relies heavily on the alleged dangers of "personal solicitation", and argues that appellant's letter constituted inter alia, "undue influence and over-reaching" and "an invasion of privacy." Brief at 38,46. An FCC report on "home solicitation sales" and other studies on "direct selling" are marshalled to support these assertions. See, e.g., Brief at 39-40,46. See also Brief at 30. "The [appellant's] solicitation invaded the privacy of the home."

<sup>8/</sup> Whatever pressure Mrs. Williams may have felt from others, she testified that appellant did not try to pressure or persuade her to file a lawsuit. Appendix 51,52. Thus, this case raises no question concerning [Footnote Continued]



(5) Appellee strongly implies that the malpractice cause of action pleaded in the complaint in Doe v. Pierce, No. 74-475 (D.S.C. 1974) was dropped prior to trial because that cause of action obscured the ACLU's effort "to promote the civil liberties issue." Brief at 42 and n. 83. This outrageous charge is, of course, unsupported by the record, and has not been made before. Such conduct would plainly be contrary to the ACLU's policy that "in any case where the ACLU or an affiliate has undertaken to furnish direct representation, the judgment of the attorneys who provide such representation must be governed by the client's interest, not the organization's, since they are acting as attorneys for the client, and not for the ACLU." Policy #513, 1976

[Footnote 8 Continued]

a disciplinary rule or finding censuring an attorney for thrusting professional services on an individual who has expressly communicated a decision against litigation. Compare Lamont v. Postmaster General, 381 U.S. 301, 305 (1965); Rowan v. United States Post Office, 397 U.S. 728, 737, 738 (1970); Breard v. City of Alexandria, 341 U.S. 622, 626.

Policy Guide of the American Civil Liberties Union. As this Court is well aware, the ACLU has no hesitation in appearing as amicus curiae when it wishes to assert primarily its own organizational beliefs or when direct representation would obscure civil liberties issues. In fact, the record in Doe v. Pierce shows that the malpractice count was not tried because the trial court would not accept pendent jurisdiction over such a state law claim. Doe v. Pierce, Civ. No. 74-475, D.S.C., Appendix on appeal, sub. nom. Walker v. Pierce, 560 F. 2d 609 (4th Cir. 1977) Appendix, Vol. II, pp. 68-72.

(6) Finally, appellee asserts that the ACLU office was in the same offices as appellant. Brief at 5 note 2. That assertion is not supported by the record. In fact, the ACLU's offices were totally separated from appellant's office, although they were located in the same building.

## II. Appellee's Legal Arguments Have No Merit.

Insofar as the legal arguments made in appellee's brief are not improperly predicated on factual misstatements, or upon facts not in the record, those arguments are generally refuted by the discussion in appellant's brief, and we will not repeat that legal analysis here. However, a few points merit brief reply.

A. None of the grounds on which the state attempts to distinguish NAACP v. Button or its succeeding cases involving the provision of legal services by organizations has merit. Although the state argues that Button was a case involving not "even-handed and neutral" rules but "censorial rules directed at a particular group or viewpoint" (Brief at 28), the Court in that case expressly declined to strike down the statute in question on the theory that its enactment was racially motivated (371 U.S. at 444-45). To the contrary, the Virginia Court held that the NAACP had violated the Canons, and relied on decisions of other

states construing the Canons as applied to solicitation in non-racially sensitive contexts. See NAACP v. Harrison, 202 Va. 142, 116 S.E. 2d 55, 67-68 (1960). Nor can Doe v. Pierce be considered "essentially private litigation for damages" in contrast with the NAACP's "actions against government" (Appellee's Brief at 25). The gravamen of Doe v. Pierce was precisely that the coerced sterilization alleged was state action, and the plaintiffs in Doe, just as plaintiffs in the NAACP's desegregation actions, sought to ensure that state action infringing constitutionally protected rights would be exposed, enjoined, and deterred.

In fact, as examination of the state court opinion in Button makes clear, the organizational behavior found constitutionally protected in Button (and other cases) was substantially more "aggressive" than the behavior for which appellant has been reprimanded in this case--behavior that, we repeat, consists of no more than a single letter addressed to a woman whom appellant reasonably believed had requested such a letter. See, e.g., NAACP v. Harrison 202

Va. 142, 116 S.E. 2d 55,65 (1960):

"Members of the NAACP, representatives of the Conference and its legal staff appear before the membership of local branches and other groups in communities in which the organizations wish suits to be brought and by persuasive methods urge those present to assert their constitutional rights to eliminate racial discrimination by becoming parties plaintiff to legal proceedings, when many of the prospective litigants have had no previous thought of doing so. The services of attorneys selected by the NAACP, its conference and the Fund are offered at no cost to the prospective litigants as an inducement to institute suit."

See also NAACP v. Button, supra, 371 U.S. at 421. Similarly, the Court has reversed state decisions holding that attorneys may not be compensated for lawsuits generated by offers of services. NAACP v. Button, supra, 371 U.S. at 420, 434, 449; Brotherhood of Railroad Trainmen v. Virginia, supra, 377 U.S. at 7; United Mine Workers v. Illinois, 389 U.S. 217, 225 (1967). The South Carolina ACLU, on the other hand, has never allowed cooperating attorneys to be compensated, and the record shows that appellant was not even reimbursed for out-

of-pocket expenses for any of her ACLU activities.

Moreover, it is settled that the state cannot simply assert that an organization is controlling litigation in conflict with the interest of the client; the state has the burden of proving such improper control. NAACP v. Button, supra, 371 U.S. at 433, 444; UMW v. Illinois, 389 U.S. at 220. Cf., Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. at 9 (Clark, J., dissenting). There is no evidence of such improper control in the record of this case, and any inference of such control is contradicted by the ACLU's policy, supra, and Appellant's Brief at 52 note 1.<sup>9/</sup>

<sup>9/</sup> Nor can NAACP v. Button be distinguished, as appellee would have it, on the ground that here, but not there, there is no identity of interest between the organization and its non-member potential client. See Brief at 41-42. The limitation of issues to be addressed, ratified by the client in a retainer agreement, is no different in principle or operation from the NAACP policy in Button to litigate only desegregation issues, and always to forego "equal facilities" strategies, regardless of the circumstances of the particular case. Cf. 371 U.S. at 462 (Harlan, J. dissenting).



B. To the extent the state identifies substantive evils it has a valid interest in preventing, the state must attempt to reach those evils through the least restrictive regulations. United Transportation Union v. Michigan, 401 U.S. 576, 581 (1971); Brotherhood of Railroad Trainmen v. Virginia, *supra*, 377 U.S. at 7-8; NAACP v. Button, 371 U.S. at 433-35.<sup>10/</sup> But the reprimand at issue here was based on the state's interest in preventing evils that

<sup>10/</sup> The letter to Mrs. Williams cannot properly be described as simply "commercial" speech. The letter included advice about the availability of free legal services to challenge enforced sterilization, and it repeatedly offered to convey additional information to Mrs. Williams regarding her rights. The letter also proposed that Mrs. Williams might help to publicize the important issues raised by enforced sterilization in South Carolina. J.S.A. at 25a-26a. Here, as in Bigelow v. Virginia, 421 U.S. 809, 822 (1975), "appellant's First Amendment interests coincided with the constitutional interests of the general public." New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Thomas v. Collins, 323 U.S. 516, 531 (1945); contrast, Pittsburgh Press v. Human Relations Commission, 413 U.S. 376, 385 (1973). Because the letter is virtually pure speech, not "speech plus", the doctrine of overbreadth is applicable. Cf. Broderick v. Oklahoma, 413 U.S. 601 (1973). Although

[Footnote Continued]

have not occurred, an interest that can be, and is currently, protected by more narrowly drawn regulations than the overbroad construction of DR 2-103(D)(5) relied on here.

For example, South Carolina has adopted specific rules prohibiting "conflicts of interest." <sup>11/</sup> A state may directly regulate attorney's fees in certain cases, so that attorneys soliciting remunerative business cannot charge excessive fees. Legitimate privacy interests may be fully protected by protecting persons in particular situations where undue influence is likely, and by allowing them to prevent contacts by explicit notice to attorneys if they wish to

[Footnote 10 Continued]

Mr. Justice Harlan frequently referred to litigation as "speech plus", he did not, as appellee asserts, refer to an offer of services as "speech plus". See, NAACP v. Button, 371 U.S. at 455 (Harlan, J., dissenting).

<sup>11/</sup> For example, DR 5-107(B) provides:

"A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgement in rendering such legal services."

See also DR 5-101(A), and Ethical Considerations 5-23 and 5-24. Appellee has never

[Footnote Continued]

be let alone.<sup>12/</sup> South Carolina concedes that "not all lawyers will mislead, overreach, or subordinate the interests of their clients (Brief at 48), and no reason has been advanced why the state could not prevent the evils it seeks to avoid with a narrower regulation. The construction of DR 2-103(D) urged by appellee would prohibit any attorney employed by a public interest organization like the ACLU or the NAACP, or any attorney assisting or cooperating with similar organizations (e.g., by sitting on the organization's Board of Directors, or

[Footnote 11 Continued]

previously asserted conflicts of interest in this case, even in its motion to Dismiss or Affirm in this Court.

12/ See, for example, proposed DR 2-104, Subcommittee on the Code of the Legal Ethics Committee of the District of Columbia Bar, reprinted in Bar Report, District of Columbia Bar, Vol. 4, No. 1, February 1976, p. 8. Cf. Rowan v. United States Post Office, 397 U.S. 728, 737, 738 (1970). In this regard, appellant notes that there is no record support for appellee's suggestion (Brief at 11) that appellant was aware at the end of August that Mrs. Williams' child was still ill. The Assistant Attorney General never asked Ms. Smith about Mrs. Williams' child at the disciplinary hearing. South

[Footnote Continued]

raising funds), from recommending to a non-lawyer that he or she retain the organization's services. Conversely, South Carolina's construction of DR 2-103(D) would prohibit any attorney whose work put him in contact with individuals to whom he recommended the services of a public interest legal organization from voluntarily assisting, at other times and in other ways, that organization. This is precisely the type of restriction on activities of attorneys that this Court explicitly rejected in NAACP v. Button, supra, 371 U.S. at 434-435. The impact of this construction of the activities of the public interest bar cannot be overstated and stands in stark contrast with Congress' recent determination to support the civil rights bar (including, specifically, public interest organizations) by authorizing awards of reasonable

[Footnote 12 Continued]

Carolina's new-found interest in protecting Mrs. Williams from invasions of privacy and from overreaching has not lead to disciplinary charges against Dr. Pierce's attorney, who was aware of that critical illness and who asked her to sign a release after confronting her in Dr. Pierce's office where she had gone for a checkup. App. 50, 243. Compare DR 7-104(a)(2).



attorneys fees in civil rights actions. 42 U.S.C. §1988. It cannot be assumed that Congress would encourage the unethical practice of law by attorneys; yet the effect of the Civil Rights Attorney's Fees Awards Act of 1976 in South Carolina is to disable every lawyer who assists or cooperates with public interest organizations which furnish legal services from recommending the services of those organizations. A state may not invoke disciplinary sanctions on attorneys when such sanctions "infringe... the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." Brotherhood of Railroad Trainmen v. Virginia, supra, 337 U.S. at 7.

C. Appellee now concedes that appellant cannot constitutionally be reprimanded for the activities she undertook at the July meeting. But if educational activities at that meeting were protected, so too is the August letter, which had precisely the same purpose--that is, to inform Mrs. Williams of the facts necessary to make an informed

choice about litigation.<sup>13/</sup>

D. Appellee concedes on appeal that the reprimand must be based on compelling state interests, and goes to great length in this Court to comply with this fundamental requirement for state regulations that affect the exercise of constitutionally protected activity. But the record and the opinion below do not specify or reflect any of the interests appellee now asserts were infringed by appellant's conduct. Appellee asks this Court to assess, de novo, the importance of the various interests it belatedly asserts, although they were never mentioned in its briefs before the court

<sup>13/</sup> See Appellee's Brief at 30. Appellee's claim that appellant's letter "did not provide any additional information to Mrs. Williams" is misleading. The purpose of the letter, stated clearly in the first and last paragraphs, was to arrange a meeting where additional information could be conveyed. The letter also advised Mrs. Williams for the first time that the ACLU was definitely willing to provide legal representation if she so desired.



below. Since the state court relied on none of them, this Court should not either, Sherbert v. Verner, 374 U.S. 398, 407 (1963). No reason has been advanced to justify ignoring that sound rule in this case.

E. Even if the Court considers it appropriate to review the alleged state interests, it is clear for the reasons advanced in appellant's brief at 45-51 that those interests do not justify discipline of appellant for the sole act of writing the August letter.

F. The State devotes its entire discussion of the question of fair notice to the proposition that citation of a particular rule is not necessary to give fair notice. However, that discussion misses the gist of appellant's argument: i.e., that the charge must specify the elements to which a response is required. Indeed, in the principal South Carolina case relied upon by appellee, the complaints set forth detailed recitations of the factual bases for the charges and cited four specific Canons of Ethics. Burns v. Clayton, 237 S.C. 316, 117 S.E. 2d 300, 307-308 (1960). As set forth in appellant's Reply to Motion to Dismiss or

Affirm, pp. 10-11, there were numerous crucial elements that were wholly omitted from the complaint here. Indeed, appellant's Memorandum filed with the hearing panel stated unambiguously her understanding that the only rule she was being charged with was DR 2-103(A). See Brief for Appellant at 69.

Finally, throughout the proceedings, the hearing panel repeatedly disclaimed any interest in the operation of the ACLU, so that appellant and her counsel assumed the panel had rejected any argument based on DR 2-103(D). Such proceedings simply cannot be squared with the fair notice required by due process of law.

CONCLUSION

For the foregoing reasons, the order and judgment of the Supreme Court of South Carolina should be reversed.

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Supreme Court, U. S.  
**FILED**

NOV 22 1977

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1977

No. 77-56

In the Matter of

EDNA SMITH,  
*Appellant,*

On Appeal from the Supreme Court of South Carolina

## **BRIEF FOR AMICUS CURIAE THE STATE BAR OF CALIFORNIA**

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1977

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No. 77-56

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In the Matter of Edna SMITH,  
Appellant.

---

ON APPEAL FROM  
THE SUPREME COURT OF SOUTH CAROLINA

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BRIEF FOR AMICUS CURIAE  
THE STATE BAR OF CALIFORNIA

---

INTEREST OF AMICUS CURIAE\*

A. Nature of Amicus Curiae

Amicus curiae The State Bar of California (hereinafter "California Bar") is a public corporation which is, under California law, a component of the judicial branch of the state's government.

As such, the California Bar performs essential state governmental functions, including serving as an administrative arm of the Supreme Court of the State of California (hereinafter "California Supreme Court") in attorney admission, discipline and reinstatement matters. Cal.Const., art. 6, §§9, 6, 8; Cal.Bus. & Prof. Code, §§6001, 6008, 6008.1, 6008.2; Emslie v. State Bar (1974) 11

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\* The parties to this appeal have consented to the filing of an amicus curiae brief by The State Bar of California. A written stipulation evidencing their consent is on file in the office of the Clerk of this Court.



Cal.3d 210, 224 [13], 113 Cal.Rptr. 175, 520 P.2d 991; Brotsky v. State Bar (1962) 57 Cal.2d 287, 301 [12, 13], 19 Cal.Rptr. 153, 368 P.2d 697. With regard to matters of attorney discipline alone, the California Bar operates an elaborate disciplinary court system for the California Supreme Court, at an annual cost in excess of \$1.5 million. This cost is borne solely by the more than 54,000 members of the California Bar.

The California Bar is directed and managed by a Board of Governors (hereinafter "Board"), the members of which are public officers.\* Chronicle Publishing Company v. Superior Court (1960) 54

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\* The Board consists of 15 attorney members elected from geographic districts by California attorneys, and 6 nonattorney members appointed from the state at large by the Governor. Cal.Bus. & Prof. Code, §§6011-6013.5.

Cal.2d 548, 566 [8], 7 Cal.Rptr. 109, 354 P.2d 637. The Board is specifically empowered by state law "[w]ith the approval of the [California] Supreme Court, . . . [to] formulate and enforce rules of professional conduct for all members of the bar in the State." Cal.Bus. & Prof. Code, §6076. The rules thus formulated, however, are not binding until approved by the California Supreme Court. Cal. Bus. & Prof. Code, §§6076-6077. Upon such approval, they become rules of that court. Barton v. State Bar (1930) 209 Cal. 677, 680 [2], 289 P. 818.

B. California's Rules Protect Constitutional Activity While Also Protecting the Public From Direct Solicitation and Ambulance Chasing

Ever since California's Rules of Professional Conduct were first formulated by the Board and approved by the California Supreme Court in 1928, they

have prohibited attorneys from soliciting professional employment for their own purposes, either directly themselves or indirectly through lay intermediaries such as ambulance chasers. See Cal. Rules of Prof. Conduct, former rule 2 (204 Cal., at p. xci); present rule 2-101 (14 Cal.3d, at p. Rules 1); proposed rule 2-101(A) [see, infra, Appendix A, at p. 1]; proposed interim rule 2-101(A) [see, infra, Appendix B, at p. 1].\*

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\* Almost a year before this Court's decision in Bates v. State Bar of Arizona (1977) \_\_\_ U.S. \_\_\_, 97 S.Ct. 2691 [hereinafter "Bates"], the Board proposed to the California Supreme Court extensive -- and experimental -- revisions to California's Rules of Professional Conduct designed to permit greater flow of information about what attorneys do and cost. These proposed revisions would permit information about many California attorneys to be published in expanded, nontraditional and readily-available law lists, legal directories and telephone books, with appropriate prescriptions concerning

(footnote continued on next page)

This fundamental prohibition protects the public against situations that present

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(footnote continued from preceding page) form and content to foster comparisons and prevent deception. For the convenience of this Court, they are reproduced, infra, as Appendix A.

These proposed new California rules were filed on August 26, 1976 under the title and number, In the Matter of the Proposed Repeal of Rule 2-106, Rules of Professional Conduct, Cal.Sup.Ct. Bar Misc. No. 3922.

Shortly after this Court's decision in Bates, the Board embarked on a review of its earlier proposal in light of Bates. The Board also proposed that until that review can be completed and the result acted upon, the California Supreme Court repeal the existing California Rules of Professional Conduct regarding advertising by attorneys (rules 2-101, 2-102, 2-103(A)(5), (A)(6), (A)(7), 2-106(1) and 2-106(4) [see 14 Cal.3d, at pp. Rules 1-5 and 13-14]) and adopt instead an interim rule containing two fundamental prohibitions: one against false and misleading advertising; and the other against attorneys soliciting professional employment for their own purposes, either directly themselves or indirectly through lay intermediaries such as ambulance chasers. For the convenience of this Court, the proposed interim rule is reproduced, infra, as Appendix B.

The proposed interim California rule was filed on August 17, 1977 under the same title and number as the Board's prior proposal. It is still pending before the California Supreme Court.

risks of undue influence, overreaching, misrepresentation and conflicts of interest between attorneys and the persons they seek to represent. See, e.g., Ohio State Bar Association v. Ohralik (1976) 48 Ohio St.2d 217, 357 N.E.2d 1097, prob.juris. noted May 24, 1977, sub nom. Ohralik v. Ohio State Bar Association (U.S.Sup.Ct. Docket No. 76-1650); Geffen v. State Bar (1975) 14 Cal.3d 843, 122 Cal.Rptr. 865, 537 P.2d 1225; Younger v. State Bar (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5; Hildebrand v. State Bar (1950) 36 Cal.2d 504, 523-524, 225 P.2d 508 (Traynor, J., concurring).

But the prohibition is not absolute. The California Bar and the California Supreme Court have long recognized, as stated by former California Chief Justice Traynor in his concurring opinion in

in Hildebrand, supra, that "[t]here are situations, however, when an attorney's association with a lay organization fulfills a legitimate interest of the organization or its members, and presents no risk of conflicting interests or other abuses." 36 Cal.2d, at p. 524.

Thus, California's Rules of Professional Conduct have been consciously framed so as to permit the activities referred to by Justice Traynor and, at the same time, prohibit activities that involve risk of harm to the public. For example, the rules have not only permitted, but also fostered the development of lawyer reference services (rule 2-104(C)), group legal services (rule 2-104(D)), prepaid legal services (rule 2-104(E)) and legal aid programs (rule 2-104(F)). California rule 2-104(F), which is particularly



relevant to the Smith case now before this Court, expressly provides, in pertinent part, as follows:

"The participation of a member of the State Bar in a legal aid plan or program for the furnishing of services to indigents or pursuant to the plan or program of a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect of their civic or political or constitutional rights and not otherwise in furtherance of such charitable or other public purposes of such organization, and the publicizing of such plans or programs are not, of themselves, violations of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized."

(Emp. added.)

This Court has itself recognized the important distinction between activities which benefit the public and situations that present risk of harm to the public.

In a series of four landmark decisions, the Court clearly established

that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 585, 91 S.Ct. 1076, 1082 [hereinafter "United Transportation Union"]; see United Mine Workers of America v. Illinois State Bar Association (1967) 389 U.S. 217, 88 S.Ct. 353 [hereinafter "United Mine Workers"]; Brotherhood of Railroad Trainmen v. Virginia (1964) 377 U.S. 1, 84 S.Ct. 1113 [hereinafter "Railroad Trainmen"]; National Association for the Advancement of Colored People v. Button (1963) 371 U.S. 415, 83 S.Ct. 328 [hereinafter "NAACP"].

In doing so, however, this Court did not invalidate the fundamental prohibition against attorneys soliciting professional

employment for their own purposes. Instead, the Court recognized a distinction between solicitation and the activities involved in the cases, and held that the prohibition against solicitation could not be applied so as to prohibit collective activity undertaken to obtain meaningful access to the courts. See, e.g., United Mine Workers, 389 U.S., at pp. 222-223, 88 S.Ct., at pp. 356-357; Railroad Trainmen, 377 U.S., at pp. 6-7, 84 S.Ct., at pp. 1116-1117; NAACP, 371 U.S., at pp. 439-444; 83 S.Ct., at pp. 341-343.

Thus, constitutionally protected activity constitutes an exception to the prohibition against solicitation; the exception coexists with the prohibition.

C. Purposes of This Brief

It is significant that in proposing amendments to California's Rules of Professional Conduct so as to permit advertising by lawyers, the California Bar has not

eliminated either (a) the fundamental prohibition against solicitation in situations that present risk of harm to the public or (b) the express recognition of constitutionally-protected activity embodied in present rule 2-104(F).

The California Bar believes that the two are distinguishable -- that the competing interests can be accommodated in such a way as to recognize constitutionally-protected activity while, at the same time, prohibiting activity which presents risk of harm to the public.

Should this Court choose to decide the Smith case on the present state of the record, the California Bar respectfully urges the Court to continue to be cognizant of the vital distinction between the apparently constitutionally-protected activity involved herein and the solicitation by the attorney for his own purposes

involved in the Ohralik case (Docket No. 76-1560).

But because the Supreme Court of South Carolina (hereinafter "South Carolina Supreme Court") did not engage in the requisite consideration of First Amendment interests, the Smith case is not ripe for decision by this Court and the California Bar also respectfully urges this Court to remand it to the South Carolina Supreme Court for such consideration in light of Bates.

## DISCUSSION

- I. THIS CASE IS NOT RIPE FOR DECISION BY THIS COURT. IT WAS DECIDED BY THE SOUTH CAROLINA SUPREME COURT BEFORE THIS COURT'S DECISION IN BATES, AND THE SOUTH CAROLINA SUPREME COURT FAILED TO CAREFULLY CONSIDER THE FIRST AMENDMENT CLAIM ASSERTED BY SMITH. CONSEQUENTLY, THE CASE SHOULD BE REMANDED FOR SUCH CONSIDERATION.

This Court held in Bigelow v. Virginia (1975) 421 U.S. 809, 95 S.Ct. 2222, that commercial speech was entitled to certain protection under the First Amendment. In doing so, the Court noted as follows (421 U.S., at p. 826):

"The Court has stated that 'a State cannot foreclose the exercise of constitutional rights by mere labels.' NAACP v. Button, 371 U.S., at 429. Regardless of the particular label asserted by the State - whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation' - a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."

(Emp. added.)

But that is precisely what happened in this case. Labeling Smith's conduct as "solicit[ation]. . . on behalf of the ACLU"



(233 S.E.2d, at p. 303), the Supreme Court of South Carolina escaped the difficult task of assessing the First Amendment interests at stake in the case and weighing them against the public interest served by the ban on solicitation of professional employment by lawyers. The state court thus wholly failed to undertake the careful consideration and deliberate constitutional balancing directed by this Court in Bigelow.

The published per curiam opinion of the Supreme Court of South Carolina contains no discussion whatsoever by the court of Smith's First Amendment claims (268 S.C. 259, 233 S.E.2d 301, Juris.Stmt., at pp. 1a-14a). Instead, the state court simply quoted portions of the report of the Hearing Panel of the South Carolina Board of Commissioners on Grievances and Discipline (268 S.C. 259, 233 S.E.2d, at p. 302; Juris.Stmt., at pp.2a-3a).

The hearing panel likewise failed to carefully consider the First Amendment issues raised by Smith. Its entire discussion of Smith's First Amendment claims was embodied in the following five paragraphs (268 S.C. 259, 233 S.E.2d, at pp. 305-306[7], Juris.Stmt., at pp. 11a-14a):

"The final query then is was the solicitation protected under the First and Fourteenth Amendments, as earnestly urged by respondent. DR 2-103(D)(5) specifically recognizes the inherent constitutional problems and provides for the same by allowing an attorney to cooperate with the legal service activities of a "non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances, and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met. . . ." Thus, DR 2-103(D)(5) prohibits solicitation except where controlling constitutional interpretations mandate the allowance of the specific service.  
[Emp. in original.]

Furthermore, in order for an attorney to solicit on behalf of a non-profit organization, the four conditions of DR 2-103(D)(5)(a-d) must be met unless application of these four conditions has, jointly or severally, been prohibited by controlling constitutional interpretations.

"The first of the above mentioned four conditions is that "[t]he primary purposes of [non-profit] organizations do not include the rendition of legal services." The ACLU, the non-profit organization herein involved, by its own admission, may have several thousand lawsuits in progress at any one day and they classify themselves as private attorneys general. It follows, therefore, that its primary purpose is the rendition of legal services. This Panel has not found, nor has it been furnished with, any case showing that a state is prohibited, on constitutional grounds, from regulating the activities of attorneys' soliciting clients on behalf of a non-profit organization which has as one of its primary purposes the rendition of legal services. Respondent relies on four cases: NAACP v. Button, supra, 371 U.S. 415, 9 L.Ed.(2d) 405, 83 S.Ct. 328; Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 12 L.Ed(2d) 89, 84 S.Ct. 1113; United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 19 L.Ed.(2d) 426, 88 S.Ct. 353 and United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 28 L.Ed.(2d) 339, 91 S.Ct. 1076. None of the four non-profit organizations involved in

the above cases, has as one of its primary purposes, the rendition of legal services. In NAACP v. Button, the court addresses itself to the legal services rendered by the NAACP. However, the court appears to characterize the NAACP as a political, rather than legal organization, and depicts litigation as an adjunct to the overriding political aims of the organization.

"That the American Bar Association considered the aspect of the NAACP case is obvious from the fact that the second of the above conditions allows solicitation where "the recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization." As pointed out litigation is the primary purpose of the ACLU; it is not simply incidental to its primary purpose. This condition is not constitutionally prohibited, but is rather constitutionally required by NAACP v. Button.

"In that there is no question but that respondent has not violated the second and third conditions of DR 2-103(D)(5), there is no need to question whether they are constitutionally prohibited or not.

"Respondent has, therefore, violated DR 2-103(D)(5)(a) by attempting to solicit a client for a non-profit organization which, as its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit

organization. If respondent's contention that her actions were protected by the First and Fourteenth Amendments of the Constitution were upheld, it would amount to a holding that the pertinent provision of Canon 2 of the Code of Professional Responsibility was unconstitutional, which we are not prepared to do."

(Emp. added)

This is not the careful balancing of competing interests that this Court called for in Bigelow. It is merely a determination that Smith's conduct violated the rule and a statement of the hearing panel's unwillingness to vindicate Smith's First Amendment claims at the expense of the rule.

The hearing panel apparently did not even consider the possibility that the rule itself might be, at the same time, constitutional on its face but unconstitutionally applied to Smith's conduct. (See, e.g., Bates v. State Bar of Arizona (1977) \_\_\_ U.S. \_\_\_, 97 S.Ct. 2691; Jacoby v. State Bar (1977) 19 Cal.3d 359, 138 Cal.Rptr. 77, 562 P.2d 1326.) (One reason for this failing

may be that the hearing panel filed its report on October 6, 1975 (App., at p. iii) -- before this Court handed down its decisions in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (May 24, 1976) 425 U.S. 748, 96 S.Ct. 1817, and Bates v. State Bar of Arizona (June 27, 1977) \_\_\_ U.S. \_\_\_ 97 S.Ct. 2691.)

For whatever reason, it is patently clear that neither the hearing panel nor the Supreme Court of South Carolina carefully considered and balanced the competing interests involved in this case.

The California Bar respectfully submits that the case should be remanded to the Supreme Court of South Carolina for the assessment and weighing directed in Bigelow, particularly in light of this



Court's recent decision in Bates.\*

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\* This Court should not undertake the requisite balancing itself because the record does not adequately reveal the competing interests and only the Supreme Court of South Carolina is in a position to direct such further proceedings as may be necessary to fully develop the nature and extent of the individual, consumer and public interests involved.

The confused state of the record is well illustrated by the differing facts found by the hearing panel and summarized by the parties in their pleadings before this Court. For the convenience of the Court, these three versions of the facts are tabulated side-by-side in Appendix C, infra.

II. IF THIS COURT NONETHELESS CHOOSES TO DECIDE THIS CASE IN ITS PRESENT POSTURE, IT SHOULD CLEARLY DISTINGUISH THE CONDUCT INVOLVED HEREIN FROM THE SOLICITATION INVOLVED IN THE OHRALIK CASE AND THUS PRESERVE THE BAN ON AMBULANCE CHASING AND DIRECT SOLICITATION BY ATTORNEYS FOR THEIR OWN PURPOSES

While the facts in this case are far from clear (see, supra, fn.\* at p. 20; infra, Appendix C), the hearing panel concluded that (268 S.C. 259, 233 S.E.2d, at p. 303; Juris.Stmt., at p. 6a):

"The evidence is inconclusive as to whether the respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages."

If the conclusion that the solicitation was "on behalf of the ACLU" is factually correct (see Smith's version of the facts, infra, Appendix C), the solicitation would appear to be constitutionally protected.

In a series of four landmark decisions, this Court clearly established that "collec-

tive activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."

United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 585, 91 S.Ct. 1076, 1082; see United Mine Workers of America v. Illinois State Bar Association (1967) 389 U.S. 217, 88 S.Ct. 353; Brotherhood of Railroad Trainmen v. Virginia (1964) 377 U.S. 1, 84 S.Ct. 1113; National Association for the Advancement of Colored People v. Button (1963) 371 U.S. 415, 83 S.Ct. 328.

Responding to these cases, the American Bar Association initially amended its Code of Professional Responsibility to permit lawyers to cooperate with the legal service activities of any nonprofit organization that recommends, furnishes or pays for legal services to its members or beneficiaries,

"but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities. . . ."

ABA DR 2-103(D)(5). This version of the rule is still in effect in South Carolina.\*

This South Carolina rule gives the four landmark decisions of this Court the narrowest possible reading, prohibiting cooperation with all legal service activities of nonprofit organizations other than those specifically considered in the NAACP line

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\* The American Bar Association subsequently amended its Code of Professional Responsibility effective March 1, 1974 so as to delete the quoted restriction (see ABA DR 2-103(D)(4)), but the Supreme Court of South Carolina refused to adopt a similar amendment.

For the convenience of this Court, the South Carolina and current ABA rules are set forth alongside the comparable California rule in Appendix D, infra.

of cases. The rule may thus unduly chill First Amendment freedoms and not withstand constitutional scrutiny. (See, e.g., United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 579-580, 91 S.Ct. 1076; Bates v. State Bar of Arizona (1977) \_\_\_ U.S. \_\_\_, 97 S.Ct. 2691; see also Jacoby v. State Bar (1977) 19 Cal.3d 359, 138 Cal.Rptr. 77, 562 P.2d 1326.)

But this Court would not have to vitiate the fundamental prohibition against solicitation in order to vindicate the First Amendment rights of the ACLU in this case. Nor should it do so.

It is important to note that in the NAACP line of cases, this Court did not invalidate the rules prohibiting attorneys from soliciting professional employment for their own purposes, either directly

themselves or indirectly through lay intermediaries such as ambulance chasers. Instead, the Court recognized a distinction between solicitation and the activities involved in the four landmark cases, and held that the prohibition against solicitation could not be applied so as to prohibit collective activity undertaken to obtain meaningful access to the courts. See, e.g., United Mine Workers, 389 U.S., at pp. 222-223, 88 S.Ct., at pp. 356-357; Railroad Trainmen, 377 U.S., at pp. 6-7, 84 S.Ct., at pp. 1116-1117; NAACP, 371 U.S., at pp. 439-444; 83 S.Ct., at pp. 341-343.

Thus, constitutionally protected activity constitutes an exception to the prohibition against solicitation; the exception can coexist with the prohibition.

For example, the pertinent California Rule of Professional Conduct is dramatically



different from the South Carolina rule.\* California's rule provides that "[t]he participation of a member of the State Bar . . . pursuant to the plan or program of a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect of their civic or political or constitutional rights[\*\*] . . . [is] not . . . [a violation] of these Rules of Professional Conduct." (Cal. Rules of Professional Conduct, rule 2-104(F).)

This California rule, which affords breathing room to the constitutional guarantees enunciated by this Court in the NAACP line of cases, coexists with a ban

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\* See, infra, Appendix D.

\*\* The ACLU is such an organization. See NAACP, fn. 19, 371 U.S., at pp. 440-441; 83 S.Ct., at pp. 341-342.

on the solicitation of professional employment by lawyers for their own purposes. (Compare Cal. Rules of Professional Conduct, rule 2-101 with rule 2-104(F).)

California's rules thus protect certain collective activity undertaken to obtain meaningful access to the courts while, at the same time, prohibiting individual activity undertaken by attorneys for their own purposes.

The distinction is vital because the prohibition against solicitation protects the public from situations that present risks of undue influence, overreaching, misrepresentation and conflicts of interest between attorneys and the persons they seek to represent. See, e.g., Ohio State Bar Association v. Ohralik (1976) 48 Ohio St.2d 217, 357 N.E.2d 1097, prob.juris. noted May 24, 1977, sub nom. Ohralik v.

Ohio State Bar Association (U.S. Sup. Ct. Docket No. 76-1650); Geffen v. State Bar (1975) 14 Cal.3d 843, 122 Cal.Rptr. 865, 537 P.2d 1225; Younger v. State Bar (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5; Hildebrand v. State Bar (1950) 36 Cal.2d 504, 523-524, 225 P.2d 508 (Traynor, Jr., concurring).

In California the Rule of Professional Conduct prohibiting solicitation by attorneys is complemented by a criminal misdemeanor statute enacted by the Legislature to prevent ambulance chasing. Cal. Bus. & Prof. Code, §§ 6150-6154; see Hutchins v. Municipal Court (1976) 61 Cal.App.3d 77, 132 Cal.Rptr. 158.

In the Hutchins case, a California Court of Appeal held that an attorney could be convicted of aiding and abetting and conspiring with certain lay persons acting

as runners or cappers in the solicitation of professional employment for the attorney. In doing so, the Court noted that (61 Cal. App.3d, at pp. 85-86):

"The legislative history of Business and Professions Code sections 6151 through 6154 goes back 45 years to the enactment of chapter 1043 of the Statutes of 1931. They were codified as article 9 of chapter 4 of the Business and Professions Code in 1939; a minor amendment not relevant here was made to sections 6151 and 6152 in 1963.

"The 1931 legislation was a reaction to scandalous conditions which became notorious in the late 1920's arising out of 'ambulance chasing' activities of lawyers, insurance adjusters, and claim agents. In 1929 and 1930, the State Bar created a committee on ambulance chasing and set up local administrative committees in various cities to undertake a complete investigation of such cases and to recommend discipline of attorneys under the State Bar Act for violation of the then recently adopted rules 2 and 3 of the Rules of Professional Conduct. [4 State Bar J. 160-161 (1930); 4 State Bar J., Pt. 2, 28 (1929); 5 State Bar J. 358 (1930); 5 State Bar J., Pt. 2, 33 (1930).]

"The local administrative committees investigated and made disciplinary recommendations in numerous cases. Meanwhile, the legislation which became chapter 1043 in the 1931 Legislature, Assembly Bill No. 319, was supported by the State Bar's committee on ambulance chasing. [6 State Bar J., Pt. 2, 33, 34 (1931).]

Upon its passage, the State Bar committee on ambulance chasing and the president of the State Bar expressed satisfaction that it would go far in helping to eliminate the problem of solicitation of business by members of the bar. [6 State Bar J. 166-167 (1931); 6 State Bar J., Pt. 2, 34 (1931).]

"Subsequent to the legislation, the local administrative committee in Los Angeles remained active, and cooperated with local prosecuting authorities in investigation of more ambulance chasing activities in the mid-1930's.

[Biby, Ambulance Chasers (1935) 10 State Bar J. 42; Biby, Chasing Ambulance Chasers (1936) 11 State Bar J. 97.]

"Recently attention was again drawn to this problem by a series of articles in the Los Angeles Times in March 1974, alleging an ambulance chasing ring was operating at the Los Angeles County Medical Center. The State Bar has been involved in investigation of that problem. [State Bar Reports (Apr. 1974) page 1; State Bar

Reports (Oct. 1974) page 1.] According to the amicus brief submitted by the State Bar in this case, the Los Angeles County District Attorney and the Los Angeles City Attorney, at the suggestion and with the active cooperation of the State Bar, are now actively prosecuting attorneys involved in running and capping operations."

(Pertinent footnotes in brackets; other footnotes omitted.)

The importance of the fundamental prohibition against attorneys soliciting professional employment for their own purposes was underscored by the California Supreme Court just 24 days ago when it issued its opinion in Goldman v. State Bar (October 28, 1977) \_\_\_ Cal.3d \_\_\_ (Cal.Sup. Ct.L.A. Docket No. 30679). In suspending two attorneys for one year for multiple counts of solicitation for their own purposes, the California Supreme Court noted (fn. 8, at slip opinion p. 14):

"While petitioners' proceeding was pending before this court, the



United States Supreme Court in  
Bates v. State Bar (1977) U.S.  
[53 L.Ed.2d 810, 97 S.Ct. 2691]

held, on First Amendment grounds,  
that the State Bar of Arizona may  
not 'prevent the publication in a  
newspaper of [its members'] truth-  
ful advertisement concerning the  
availability and terms of routine  
legal services.' (Id., at p. \_\_\_\_.)

"That opinion, however, does not  
hold that a proper state agency  
cannot prohibit solicitation of the  
kind involved in the petitioners'  
case. The court stated that 'we,  
of course, do not hold that advertising  
by attorneys may not be regulated in  
any way' (Id., at p. \_\_\_\_), and that  
'there may be reasonable restrictions  
on the time, place, and manner of  
advertising.' (Id., at p. \_\_\_\_.)

"More significantly, the court  
noted that it did not undertake to  
'resolve the problems associated with  
in-person solicitation of clients --  
at the hospital room or the accident  
site, or in any situation that breeds  
undue influence -- by attorneys or  
their agents or "runners." Activity  
of that kind might well pose dangers  
of overreaching and misrepresentation  
not encountered in newspaper announce-  
ment advertising.' (Id., at p. \_\_\_\_.)  
Bates affords no relief for petitioners'  
misconduct in this disciplinary pro-  
ceeding. (Cf. Jacoby v. State Bar  
(1977) 19 Cal.3d 359.)"

(Emp. added.)

If this Court chooses to decide the Smith  
case in its present posture, the California  
Bar respectfully urges that the conduct  
involved herein be clearly distinguished  
from the solicitation for personal motives  
involved in the Ohralik case so that the  
public may continue to be protected from  
the risks of undue influence, overreaching,  
misrepresentation and conflicts of interest  
that are inherent in those situations in  
which attorneys solicit professional employ-  
ment for their own purposes.

As is shown above, constitutionally-pro-  
tected activity can be distinguished and  
protected without vitiating the fundamental  
prohibition against solicitation. Not only  
can it be -- it should be.

CONCLUSION

For the reasons briefly stated above, the California Bar respectfully urges this Court to remand this case so that the competing interests involved can be fully developed before the requisite constitutional balancing is undertaken. An inadequate record such as that involved herein is not solid ground upon which to undertake delicate constitutional balancing.

If the Court nonetheless chooses to decide the case on its merits, the California Bar most respectfully urges the Court to be cognizant of the important distinction between (1) collective activity undertaken to obtain meaningful access to the courts and (2) individual activity undertaken for purely personal motives. While people need access to the courts, they also need to be free from the risks of undue

influence, overreaching, misrepresentation and conflicts of interest that arise out of solicitations by attorneys solely for their own purposes.

Dated: November 21, 1977.

Respectfully submitted,

Herbert M. Rosenthal  
Stuart A. Forsyth

Attorneys For Amicus Curiae  
The State Bar of California

## **APPENDIX**

### **PROPOSED REVISIONS TO** **CALIFORNIA'S RULES OF PROFESSIONAL CONDUCT**

**Submitted by the Board  
To the California Supreme Court  
on September 17, 1976**

#### **Rule 2-101. General Prohibitions Against Solicitation of Professional Employment.**

(A) A member of the State Bar shall not solicit professional employment. By way of example but without limiting the prohibition:

(1) A member of the State Bar shall not solicit professional employment in or about any prison or jail or other place of detention of persons, or the scene of any accident, or any hospital or sanitarium or other place of health care, or any court, or any public institution, or any public place, or any public street or highway, or any private institution or property of any character whatsoever, either personally or by use of any other person, firm, association, partnership, corporation or other entity or instrumentality acting on the member's behalf in any manner or in any capacity whatsoever.

(2) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to a person or entity for the purpose of recommending or securing the member's employment by a client, or as a reward for having made a recommendation resulting in the member's employment by a client.

(3) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to any representative of the press, radio, television or other communication medium in anticipation of or in return for publicity of the member or any other attorney.

(4) A member of the State Bar shall not solicit professional employment by recommending employment of the member or the member's partner or associate to a non-lawyer who has not sought the member's advice regarding employment of a member of the State Bar.

(5) A member of the State Bar shall not solicit professional employment by advertisement or other means of commercial publicity nor shall the member authorize or permit others to do so in the member's behalf.

#### **APPENDIX A**



(B) A member of the State Bar shall not accept employment when the member knows or should know that the person who seeks the member's services does so as a result of conduct prohibited under (A) of this rule.

(C) This rule does not prohibit the following identification of a member of the State Bar as such as well as by name and other reasonably pertinent data so long as such identification is not primarily directed to soliciting professional employment:

(1) In political advertisements;

(2) In public communications when the name and profession of a member of the State Bar are required or authorized by law or are reasonably pertinent for a purpose other than for the solicitation of potential clients;

(3) In or on legal documents prepared by the member of the State Bar;

(4) In routine reports and announcements of a bona fide business, civic, professional or political organization in which the member serves as a director or officer or other official capacity; and

(5) In or on articles, books, treatises, pamphlets, brochures or other such publications and in advertisements thereof.

#### **Rule 2-102. Public Information Communications.**

(A) A member of the State Bar may participate in the publication of any of the information about the member or the member's firm specified in (B)(3) of this rule in any of the following:

(1) Law lists and legal directories approved by the Board of Governors pursuant to the following criteria:

(a) The information published therein is substantially in the form and language specified in (B)(3) of this rule.

(b) Each such law list or legal directory is a separate collation which includes a reasonable number of attorneys (from different sole law practices, law partnerships, professional associations of attorneys practicing law together or law corporations), considering the size of the legal community and the field or fields of law involved, listed together under the title "Attorneys" or "Lawyers" and under such additional subclassifications (including, but not limited to, geo-

graphical areas in which members reside or maintain offices or regularly practice, fields of law or certified specialties) as are not likely to be misleading or injurious to the public or the profession.

(c) Preferential prominence is not given to any member listed therein, by different size or character of type, underscoring or any other method used for emphasis or to attract attention.

(d) The information itself and the manner in which the information is presented or distributed (i) are not false, fraudulent, misleading, deceptive or unfair, (ii) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (iii) do not contain laudatory statements about the member or the member's firm, (iv) are not intended or likely to create false or unjustified expectations of favorable results, (v) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (vi) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injure another, (vii) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (viii) do not contain representations or implications that are likely to deceive or to cause misunderstanding, and (ix) are not for the primary purpose of obtaining professional employment of a particular member or member's firm for a specific matter or transaction.

(e) The law list or legal directory is published no more frequently than once quarterly.

(f) The law list or legal directory contains such explanatory information as the Board of Governors may prescribe from time to time for the protection of persons to whom the communications are addressed.

(g) The law list or legal directory clearly specifies for what period of time the information contained therein will be in effect.

(h) Law lists or legal directories may be published or distributed by commercial publishers of law lists or legal directories; bar associations; newspaper publishers; publishers of telephone directories; service clubs; charitable organizations; consumer organizations; labor unions; business, professional or trade

associations; and entities enumerated in Rule 2-104, provided the person or entity publishing the law list or legal directory files with the State Bar a certification that it will not arbitrarily, capriciously or unreasonably exclude any member of the State Bar from its law list or legal directory.

A member shall not participate in the publication of information about the member or the member's firm in any law list or legal directory which the member knows or should know does not comply with the requirements of this rule and has not been approved by the Board of Governors or has been subsequently disapproved by the Board of Governors. Applications for approval of law lists and legal directories shall be made on such forms and pursuant to such rules as adopted and as from time to time amended by the Board of Governors.

(2) Classified sections of the telephone directory or directories for the geographical area or areas in which the member of the State Bar resides or maintains offices or regularly practices law, provided:

(a) All listings of members and members' firms therein are in a separate collation listed together under the title "Attorneys" or "Lawyers" and, if under subclassifications, are only arranged according to fields of law in which the member or the member's firm concentrates, primarily engages, or will accept cases, or in which the member is a certified specialist.

(b) The information permitted in (B)(3) of this rule is presented in substantially the form and language set forth therein.

(c) Introductory paragraphs or footnotes include such explanatory information as the Board of Governors may prescribe from time to time for the protection of persons to whom the communications are addressed.

(d) The presentation of the information does not violate the provisions of (1)(c) or (d) of (A) of this rule.

(3) Law lists or legal directories published periodically by the State Bar.

As used herein, "fields of law" includes, but is not limited to, administrative agency law, admiralty or maritime law, antitrust law, (field(s) of) appellate practice, bankruptcy law, business law, (field(s) of) civil practice, civil rights law, condemnation law, contract law, copyright law,

corporation and partnership law, creditor's rights law, criminal law, debtor's rights law, education law, employment law, entertainment law, environmental law, estate planning, family law, general practice, immigration and naturalization law, juvenile law, labor law, landlord and tenant law, (field(s) of) malpractice law, patent law, pension and profit sharing law, personal injury law, probate law, real estate law, senior citizens law, social security law, taxation law, trademark law, (field(s) of) trial practice, trust law, unemployment insurance law, veterans law, welfare law, worker's compensation law, zoning law.

(B) A member of the State Bar may participate in the publication of any of the information about the member or the member's firm specified in paragraph (3) of this subdivision to the extent permitted in (A) of this rule and in Rules 2-103 and 2-104, provided:

(1) Both the information itself and the manner in which the information is presented or distributed (a) are not false, fraudulent, misleading, deceptive or unfair, (b) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (c) do not contain laudatory statements about the member or the member's firm, (d) are not intended or likely to create false or unjustified expectations of favorable results, (e) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (f) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injure another, (g) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (h) do not contain representations or implications that are likely to deceive or to cause misunderstanding, and (i) are not for the primary purpose of obtaining professional employment of a particular member or member's firm for a specific matter or transaction.

(2) Only members who hold a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Governors may use the terms "certified specialist", "specialist", "specialty", "specializes" or "specializing" in describing themselves or the nature of their practice; and only members who are registered to practice in patent matters before the United States

Patent and Trademark Office may use the words "patent" or "patents" in describing themselves or the nature of their practice.

(3) Such information is presented in substantially the following form and language:

(a) Name of the member of the State Bar;

*Form:* "[name of member]"

(b) Name under which the member practices, which may be accompanied by a statement clarifying that the practice is (i) a sole practice, (ii) a law partnership, (iii) an association of attorneys or (iv) a public interest law firm which has been ruled exempt from federal income tax under the Internal Revenue Code; provided that if the name under which the member practices is a law corporation, the statement clarifying that the practice is a law corporation shall be given and shall comply with the provisions of section 6164 of the Business and Professions Code;

*Form:* "[name of member's firm, e.g. 'Legal Clinic of Doe and Roe', 'Doe and Roe, Lawyers'], ['a sole practitioner' or 'a law partnership' or 'an association of attorneys' or 'a law corporation' or 'public interest law firm']"

(c) The name(s) of predecessor law firm(s) in a continuing line of succession;

*Form:* "formerly: [name(s) of predecessor law firm(s) listed in reverse chronological order]"

(d) Address(es) and telephone number(s) of the office(s) maintained by the member or the member's firm for the practice of law;

*Form:* "[address(es)], [telephone number(s)]"

(e) Office hours regularly maintained by the member or the member's firm for the practice of law, and a statement that the member is available to meet with clients or potential clients at times other than the specified office hours;

*Form:* "office hours: [days and hours regularly maintained], [and/or 'by appointment']; [telephone answered:] [days and hours regularly answered or '24 hours']"

(f) A statement that the member is (or is not) willing to meet with potential clients at locations other than the member's office(s);

*Form:* "interviews ['not'] limited to office(s)"

(g) Language(s) other than English spoken fluently by the member;

*Form:* "fluent in: [name(s) of language(s)]"

(h) Language(s) other than English for which the member or the member's firm provides interpreter(s), and a statement whether such interpreter(s) are provided without charge;

*Form:* "'[free]' [name(s) of language(s)] interpreter(s) provided"

(i) Cost of an initial interview for a specified period of time, or a statement that such interview for a specified period of time is without charge;

*Form:* "initial interview: ['½ hour' or '1 hour' or other specified period of time], [dollar amount or 'free']"

(j) A statement that the member or the member's firm does (or does not) provide a written fee schedule, and if such fee schedule is provided a statement whether such fee schedule is provided without charge;

*Form:* "'[free]' written fee schedule available"

(k) A statement that the member or the member's firm is (or is not) willing to provide written fee estimates for specific services prior to providing such services, and if such fee estimates are provided a statement whether such fee estimates are provided without charge;

*Form:* "'[free]' written fee estimates given"

(l) Field(s) of law practiced by the member or the member's firm in which fees are set by statute;

*Form:* "[field(s) of law] fees set by statute"

(m) Hourly fee(s) or range of hourly fee(s) charged by the member or the member's firm, *together with* all of the variables and other relevant factors that could affect the amount(s) of the stated fee(s);

*Form:* "[hourly fee(s), together with all variables and relevant factors]: [dollar amount(s)]"

(n) Fee(s) or range(s) of fee(s) charged by the member or the member's firm for specific types of services, *together with* all of the variables and other relevant factors that could affect the amounts of the stated fee(s);



*Form:* "[type(s) of service(s), together with all variables and relevant factors]: [dollar amount(s)]"

(o) Type(s) of case(s) that the member or the member's firm is willing to accept on a contingency fee basis, *together with* the terms of a typical contingency fee contract (including, without limitation, how both investigation costs and litigation costs are computed and paid) *and* all of the variables and other relevant factors that could affect the stated terms;

*Form:* "contingency fee case(s): [type(s) of case(s)], [terms of contingency fee contract(s), together with all variables and relevant factors]"

(p) Name(s) of credit card(s) accepted by the member or the member's firm in payment of fees (or a statement that credit cards are not accepted);

*Form:* "[name(s) of credit card(s)] accepted"

(q) A statement that the member or the member's firm regularly accepts (or does not regularly accept) installment payments of fees on mutually satisfactory terms;

*Form:* "installment payments accepted on mutually satisfactory terms"

(r) A statement that the member or the member's firm is (or is not) willing to submit any fee dispute(s) to arbitration, and if so willing a statement that such arbitration is or is not binding;

*Form:* "fee disputes submitted to [binding] arbitration"

(s) A statement that the member holds current certificate(s) as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Governors;

*Form:* "certified specialist in [field(s) of law]"

(t) A statement that the member is registered to practice in patent matters before the United States Patent and Trademark Office;

*Form:* "patents" or "patent law" or "registered to practice in patent matters"

(u) Field(s) of law to which the member and/or member's firm limits the member's and/or firm practice;

*Form:* "[lawyer's] [firm's] practice limited to: [field(s) of law]"

(v) One or more fields of law in which the member or the member's firm concentrates or primarily engages (not to exceed (i) in the case of a member, three, and (ii) in the case of a firm, three per member or ten, whichever is less);

*Form:* "[lawyer' or 'firm'] ['concentrates in:' or 'primarily engages in:'] [field(s) of law]"

(w) One or more fields of law in which the member or the member's firm accepts cases, *together with* the information set forth in (v) above;

*Form:* "[lawyer' or 'firm'] ['concentrates in:' or 'primarily engages in:'] [field(s) of law] and accepts cases in: [field(s) of law]"

(x) A statement that the member or the member's firm is interested in providing professional services under group legal services plan(s) which the member or the member's firm does not actually serve;

*Form:* "interested in serving group plans"

(y) A statement that the member or the member's firm is interested in providing professional services under prepaid legal services plan(s) which the member or the member's firm does not actually serve;

*Form:* "interested in serving prepaid plans"

(z) One or more fields of law in which the member and/or the member's firm will not accept cases;

*Form:* "[lawyer'] [firm'] will *not* accept cases in: [field(s) of law]"

(aa) Number of active members of the State Bar (including the member) who are associated with the member or the member's firm in the practice of law on a substantially full-time basis;

*Form:* "number of California lawyers: [whole number]"

(bb) Name(s) of (i) active member(s) of the State Bar who are, (ii) deceased member(s) of the State Bar who have been and (iii) with their consent, living member(s) of the State Bar who have been, associated with the member or the member's firm in the practice of law, and a statement with regard to each, that he or she is or was (i) a full-time partner, (ii) a full-time associate or (iii) has a continuing relationship with the member or the member's firm other than as a full-time partner or a full-time associate

("of counsel"), *together with* the pertinent dates with regard to any such member who is not currently associated with the member or the member's firm in the practice of law;

*Form:* "[partner(s):] [name(s) and, if applicable, dates of former association in years]; [associate(s):] [name(s) and, if applicable, dates of former association in years]; [of counsel:] [name(s) and, if applicable, dates of former association in years]"

(cc) Date and place of the member's birth;

*Form:* "born: [date, place]"

(dd) State(s) and federal court(s) in which the member is entitled to practice law, *together with* the date(s) of admission to such practice;

*Form:* "admitted to practice in: [state, year]; [state, year]; [name of federal court, year]; [name of federal court, year]; [etc.]"

(ee) Name(s) of other professional license(s) currently or formerly held by the member, *together with* the state(s) issuing the license(s) and the pertinent dates;

*Form:* "other license(s): [official title or abbreviation of license(s) *currently* held], [state(s) of issuance], [first year of member's continuous holding of the license(s)] '-present'; [official title or abbreviation of license(s) *formerly* held], [state(s) of issuance], [dates in years that license(s) were held]"

(ff) Name(s) of school(s) from which the member has graduated, and with regard to each such school, a statement describing the nature of the school, the date the member graduated, the degree(s) the member received and any scholastic distinction(s) the member received;

*Form:* "[college' or 'law school' or 'engineering school' or other appropriate description of the nature of the school attended by the member]: [name of school, year of graduation, degree(s) received, official name or abbreviation of scholastic distinction(s) received]"

(gg) Official title(s) of public or quasi-public office(s) or post(s) of honor currently or formerly held by the member, *together with* the pertinent dates;

*Form:* "[official title or abbreviation of office(s) or post(s) of honor *currently* held], [year member's current term began] '-present'; [official title or abbreviation of office(s) or post(s) of honor *formerly* held], [dates in years that office or post was held]"

(hh) Name(s) of the branch(es) of the armed forces of the United States in which the member served, and the pertinent dates of such service;

*Form:* "[name(s) of branch(es)], [dates of service in years]"

(ii) Publication(s) authored by the member;

*Form:* "author: [title of work authored, title of publication, date of publication]"

(jj) Teaching position(s) currently or formerly held by the member, *together with* the pertinent dates;

*Form:* "[official title or abbreviation of position *currently* held], [name of school], [first year of member's continuous service in position] '-present'; [official title or abbreviation of position *formerly* held], [name of school], [dates in years that position was held]"

(kk) Name(s) of organization(s) or component(s) thereof to which the member belongs or belonged, and the pertinent dates of such membership;

*Form:* "member: [official name(s) or abbreviation(s) of organization(s) to which the member *currently* belongs], [first year of member's continuous membership therein] '-present'; [official name(s) or abbreviation(s) of component(s) of organization(s) to which the member *currently* belongs], [first year of member's continuous membership therein] '-present'; [official name(s) or abbreviation(s) of organization(s) to which the member *formerly* belonged], [dates of membership in years]; [official name(s) or abbreviation(s) of component(s) of organization(s) to which the member *formerly* belonged], [dates of membership in years]"

(ll) Name(s) of position(s) of responsibility currently or formerly held by the member in organization(s), *together with* the pertinent dates;

*Form:* "[official name(s) or abbreviation(s) of position(s) *currently* held] [first year of member's continuous service in position(s)] '-present'; [official

name(s) or abbreviation(s) of position(s) formerly held], [dates in years that position was held]"

(C) In addition to the conduct permitted by this rule, members of the State Bar and law firms may continue to be listed in a telephone directory, community directory or guide, law list or legal directory, or in a membership roster, membership register, membership directory or other membership list of a service club, charitable organization, fraternity, school alumni association or business, professional or trade association to which the member belongs, in the manner previously permitted by Rules 2-103(A)(5), (6) and (7) and 2-106(4) of the Rules of Professional Conduct extant immediately prior to effective date of this rule.

**Rule 2-103. Professional Announcements, Door and Office Signs, Professional Cards, Letterheads and Trade Names.**

Only to the extent permitted in this rule:

(A) A member of the State Bar available to act as a consultant to or as an associate of other members of the State Bar may distribute to other members of the State Bar and publish in legal journals circulated or distributed primarily to members of the State Bar or lawyers licensed in other jurisdictions an announcement in modest and dignified form of such availability setting forth any of the information permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

(B) A member of the State Bar or a member's law firm may mail to lawyers, clients, former clients, personal friends and relatives a brief professional announcement card in modest and dignified form stating new or changed associations or addresses, change of firm name, or similar matters, pertaining to the professional office of the member or of the member's firm and any of the information permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein. The announcement may be distributed only once for any new or changed association or address, change of firm name, or similar matters.

(C) A member of the State Bar or a member's law firm may have a sign in modest and dignified form on or near the door of the member's or firm's law office and in the building directory identifying the law office. The sign may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(D) A member of the State Bar or a member's law firm may use a professional card in modest and dignified form and only for the purpose of identification. The professional card of a member may identify the member by name as a lawyer and give the member's address(es), telephone number(s) and give the name of the member's law firm in substantially the form and language set forth in Rule 2-102(B)(3)(b). The professional card of a law firm may give its name in substantially the form and language set forth in Rule 2-102(B)(3)(b) and may also give the names of members and associates. The card may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(E) A member of the State Bar or a member's law firm may use stationery with a professional letterhead in modest and dignified form. The letterhead of a member may identify the member by name and as a lawyer and give the member's address(es), telephone number(s), the name of the member's law firm in substantially the form and language set forth in Rule 2-102(B)(3)(b) and the names of members and associates thereof. A letterhead of a law firm may give its name in substantially the form and language set forth in Rule 2-102(B)(3)(b) and may also give the names of members and associates, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession. A member of the State Bar may be designated "of counsel" on a letterhead if the member has a continuing relationship with a lawyer or law firm other than as a full-time partner or associate. The letterhead may state the nature of the practice only to the extent permitted under Rule 2-102(B)(3)(s), (t), (u) or (v) in substantially the form and language set forth therein.

(F) A member of the State Bar who is engaged both in the practice of law and another profession or business shall not so indicate on his or her office sign, professional card or letterhead, nor shall the member identify himself or herself as a member of the State Bar in connection with the member's other profession or business.

(G) A member of the State Bar or a member's law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the member or the firm devotes a substantial amount of professional time in the representation of that client, provided the member of the State Bar uses such letterhead only for



correspondence relating to the professional representation of the client the member represents as general counsel unless the member performs no legal services for anyone other than the client the member represents as general counsel.

(H) A member of the State Bar or a member's law firm may practice under a fictitious name, provided that such name (1) includes the member's name or the name(s) of other member(s) of the State Bar who are associated with the member or the member's firm in the practice of law or the name(s) of deceased or retired member(s) of the firm or of a predecessor firm in a continuing line of succession or the name of a partnership within the meaning of (I) of this rule or, in the case of a law corporation, complies with the provisions of section 6164 of the Business and Professions Code, (2) is not false, fraudulent, misleading, deceptive or unfair, (3) is not likely to mislead or deceive, (4) does not contain laudatory statements about the member or the member's firm, (5) is not intended or likely to create false or unjustified expectations of favorable results, (6) does not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (7) is not intended or likely to result in a legal action or position being taken or asserted primarily to harass or maliciously injure another, (8) is not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, and (9) does not contain representations or implications that are likely to deceive or to cause misunderstanding.

(I) A partnership may be formed or continued between or among lawyers licensed in different jurisdictions, provided all enumerations of the members and associates of the firm make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions, and further provided that (1) each person occupying each office of the firm located in California who shall hold himself or herself out as a member or associate of such firm shall be an active member of the State Bar and (2) each person holding himself or herself out as a member of the firm shall be a bona fide partner in such firm, with a bona fide share in the profits, liabilities and professional responsibilities thereof and (3) at least one person occupying each office of the firm located in California shall be such a bona fide partner and an active member of the State Bar.

#### **Rule 2-104. Public, Group and Prepaid Legal Service Programs.**

(A) The participation of a member of the State Bar in a legal aid plan or program for the furnishing of services to indigents or pursuant to the plan or program of a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect to their civic or political or constitutional rights and not otherwise in furtherance of such charitable or other public purposes of such organization, and the publicizing of such plans or programs are not, of themselves, violations of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such a plan or program from stating in response to inquiries as to the identity of such member of the State Bar any of the information concerning the member permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

(B) The participation of a member of the State Bar in a lawyer referral service established, sponsored, supervised and operated in conformity with the Minimum Standards for a Lawyer Referral Service in California, as adopted and as from time to time amended by the Board of Governors is not, of itself, a violation of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such lawyer referral service from identifying a member of the State Bar who is participating in that service, and stating any of the information concerning the member permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein, in connection with the making of a requested referral in conformity with the said Minimum Standards. A member of the State Bar may permit his or her name to be listed in lawyer referral service offices according to the fields of law in which the member will accept referrals and in such manner as is proper under the standards which the Board of Governors may from time to time promulgate.

(C) The furnishing of legal services by a member of the State Bar pursuant to an arrangement for the provision of such services to the individual member of a group, as herein defined, at the request of such group, is not of itself in violation of these Rules of Professional Conduct if the arrangement:

(1) permits any member of the group to obtain legal services independently of the arrangement from any attorney of his or her choice,

(2) is so administered and operated as to prevent

(a) such group, its agents or any member thereof from interfering with or controlling the performance of the duties of such member of the State Bar to the member's client,

(b) such group, its agents or any member thereof from directly or indirectly deriving a profit from or receiving any part of the consideration paid to the member of the State Bar for the rendering of legal services thereunder,

(c) unlicensed persons from practicing law thereunder, and

(d) all publicizing and soliciting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the group or the nature and extent of the legal services or both, without any identification of the member or members of the State Bar rendering or to render such services.

Nothing in this rule shall prohibit a statement in communications to persons entitled to receive legal services under the arrangement or in response to individual inquiries as to the identity of the member or members of the State Bar rendering or to render the services giving any of the information concerning the member or members permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

As used in this rule, a group means a professional association, trade association, labor union or other non-profit organization or combination of persons, incorporated or otherwise and including employees of a single employer, whose primary purpose and activities are other than the rendering of legal services.

A member of the State Bar furnishing legal services pursuant to an arrangement for the provision thereof shall advise the State Bar thereof within 60 days after entering into the same. Thereafter the member shall advise the State Bar, on forms provided by it, of the following matters: the name of the group, its address, whether it is incorporated, its primary purposes and activities, the number of its members and a general description of the types of legal

services offered pursuant to the arrangement. Annually on January 31, the member shall report to the State Bar, on forms provided by it, any changes in such matters, and the number of members of the group to whom legal services were rendered during the calendar year. Each report filed pursuant hereto and the information contained therein, except the name and address of the group, the fact that it has an arrangement for the provision of legal services and the names of members of the State Bar providing such services shall be confidential.

(D) Section a. The furnishing of legal services by a member of the State Bar pursuant to an arrangement for pre-paid legal services or other plan for defraying the costs of professional services of attorneys, is not of itself in violation of these Rules of Professional Conduct, if:

(1) the arrangement was established by or at the request of a group defined in Rule 2-104(C) of these rules for the individual members of the group and otherwise complies with Rule 2-104(C); or

(2) the arrangement is developed, administered and operated by a non-profit organization, incorporated or otherwise and

(a) permits any client to obtain legal services independently of the arrangement, from any attorney of his or her choice; and

(b) is so developed, administered and operated that

(i) the panel of attorneys furnishing legal services thereunder consists of at least 20% or 1000 of the active members of the State Bar engaged in private practice and maintaining their principal offices in the geographical area served by the arrangement, whichever is the lesser number, but in no event less than 15 such active members; and

(ii) the panel of attorneys furnishing the legal services thereunder is open to any active member of the State Bar engaged in practice in the geographical area served by the arrangement, provided that a panel of attorneys which is open to all of the members of a local bar association is deemed to comply with this requirement if membership in that bar association is open to any active member of the State Bar engaged in practice in said geographical area, and

(iii) the client shall have the right to select any attorney on the panel to perform the legal services provided that the attorney consents to perform the legal services, and

(iv) any referral of a client to an attorney or attorneys on the panel of attorneys furnishing legal services under the arrangement shall be at the request of the client and in a manner consistent with those provisions of the "Minimum Standards for a Lawyer Referral Service in California" respecting the making of referrals; and

(c) is so developed, administered and operated as to prevent

(i) a third party from interfering with or controlling the performance of duties of the member of the State Bar to the member's client, and

(ii) a third party from receiving any part of the consideration paid to the member of the State Bar for furnishing legal services thereunder except as permitted by Rules 2-108 and 3-102 of these rules, and

(iii) unlicensed persons from practicing law thereunder, and

(iv) all publicizing and soliciting activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the non-profit organization or the nature and extent of the benefits pursuant to the arrangement or both, without any identification of the member or members of the State Bar rendering or to render legal services; provided that all such publicizing and soliciting activities are in good faith engaged in solely for the purpose of developing, administering or operating the arrangement, and not for the purpose of soliciting business for, or for the self-aggrandizement of, any specific member or members of the State Bar; provided further that all publicizing and soliciting activities concerning the arrangement, except publicizing activities directed at persons entitled to receive legal services under the arrangement, shall terminate at such time as the total number of persons entitled to receive legal services under all arrangements of which the State Bar is advised pursuant to Rule 2-104(C) of these rules

is equivalent to the total number of persons entitled to receive legal services under all arrangements reported to the State Bar pursuant to Section b.1. (b) of this Rule 2-104(D). For the purposes of this subsection (c)(iv) "persons" shall not include those who are eligible to receive legal services solely by reason of being a spouse or dependent family member.

Once the requirements of Section a.2.(b)(i) of this Rule 2-104(D) have been satisfied, nothing in this rule shall prohibit a statement in communications to persons entitled to receive legal services under the arrangement or in response to individual inquiries as to the identity of the member or members of the State Bar rendering or to render the services giving any of the information concerning the member or members permitted in Rule 2-102(B)(3) in substantially the form and language set forth therein.

As used in this section, "geographical area" means any one of the following: (1) the state; (2) one or more municipal court judicial districts; (3) any combination of one or more municipal court judicial districts together with one or more counties; (4) one or more counties; (5) one or more of the superior court districts in a county of 5,000,000 or more persons according to the latest federal census.

Section b. Subject to the provisions of Section c. of this Rule 2-104(D), a member of the State Bar who has agreed to furnish legal services pursuant to an arrangement for prepaid legal services or other plan for defraying the costs of professional services of attorneys, shall

(1) Within 60 days after entering into such agreement, file a notice thereof with the State Bar, and thereafter file with the State Bar, on the report forms provided by it and within 60 days after receiving such forms, the following under either (a) or (b), as applicable:

(a) If the arrangement was established by or at the request of a group pursuant to Section a.1. of this Rule 2-104(D):

(i) the name and office address of the group, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar has entered into with the group respecting the arrangement;

(ii) if a person or entity other than the group itself is administering the arrangement, the name



and office address of such person or entity, whether such person or entity is incorporated, a copy of any agreement the member of the State Bar has entered into with such person or entity respecting the arrangement, and a copy of any agreement such person or entity has entered into with the group respecting the arrangement; and

(iii) a description of the methods and procedures under the agreement, if any, (A) whereby a client who is entitled to benefits under the arrangement may, upon request, be referred to an attorney or attorneys on the panel of attorneys furnishing legal services under the arrangement, (B) for periodically obtaining from those being served by the arrangement their comments, evaluations and recommendations respecting the operation of and furnishing of legal services under the arrangement, and (C) for resolution of client grievances.

(b) If the arrangement is developed, administered and operated by a non-profit organization pursuant to Section a.2. of this Rule 2-104(D):

(i) the name and office address of the non-profit organization and, if incorporated, a copy of its articles of incorporation and by-laws;

(ii) the geographical area served by the arrangement;

(iii) a copy of any agreement between the member of the State Bar and the non-profit organization respecting the arrangement;

(iv) the name and office address of any group being served by the arrangement, the number of its members, its primary purposes and activities, and a copy of any agreement the member of the State Bar or the non-profit organization, or both, has entered into with the group respecting the arrangement;

(v) if individuals, as distinguished from members of a group, are being served by the arrangement, then the number of such individuals and a copy of each form of agreement entered into between the non-profit organization and such individuals respecting the arrangement; and

(vi) a description of the methods and procedures under the arrangement, if any, as required under 1.(a)(iii) of this section.

(2) Annually thereafter, by January 31, file with the State Bar, on the report forms provided by it, the following: the number of persons to whom the member rendered legal services during the preceding calendar year pursuant to the arrangement, and the types of such services; and the changes, if any, in the information or documents the member filed with the State Bar under either 1.(a) or 1.(b) of this Section b.

Section c. Any notice, information or documents required to be filed by a member of the State Bar pursuant to Section b. of this Rule 2-104(D) need not be filed by such member personally if, within the time periods specified in that section, such notice, information or documents are filed on the member's behalf by either: (1) the group's officer, agent, or employee having primary responsibility for the arrangement established pursuant to Section a.1. of this Rule 2-104(D), or if such arrangement is being administered by a person or entity other than the group, by such person or entity; (2) the non-profit organization administering the arrangement pursuant to Section a.2. of this Rule 2-104(D).

When such notice, information or documents are so filed on behalf of two or more members of the State Bar for any one arrangement, they shall be consolidated where possible in a single notice or reporting form and documents already on file may be incorporated by reference so long as there are no changes therein.

Section d. Any notice, information or documents received by the State Bar pursuant to Sections b. or c. of this Rule 2-104(D) shall be public, whether or not also received by the State Bar pursuant to Rule 2-104(C) of these rules.

PROPOSED INTERIM

CALIFORNIA RULE OF PROFESSIONAL CONDUCT

Submitted by the Board  
To the California Supreme Court  
on August 17, 1977

Rule 2-101. General Prohibition Against Solicitation of Professional Employment; Use of Public Information Communications.

(A) A member of the State Bar shall not solicit professional employment by any means not permitted by these Rules. By way of example but without limiting the prohibition:

(1) A member of the State Bar shall not solicit professional employment in or about any prison or jail or other place of detention of persons, or the scene of any accident, or any hospital or sanitarium or other place of health care, or any court, or any public institution, or any public place, or any public street or highway, or any private institution or property of any character whatsoever, either personally or by use of any other person, firm, association, partnership, corporation or other entity or instrumentality acting on the member's behalf in any manner or in any capacity whatsoever.

(2) A member of the State Bar shall not solicit professional employment by compensating or giving or promising anything of value to a person or entity for the purpose of recommending or securing the member's employment by a client, or as a reward for having made a recommendation resulting in the member's employment by a client.

(3) A member of the State Bar shall not solicit professional employment by recommending employment of the member or the member's partner or associate to a non-lawyer who has not sought the member's advice regarding employment of a member of the State Bar.

(B) A member of the State Bar shall not accept employment when the member knows or should know that the person who seeks the member's services does so as a result of conduct prohibited under (A) of this rule.

(C) Publication of information about the member or the member's firm is permitted but only to the extent it complies with the following:

(1) Both the information itself and the manner in which the information is presented or distributed (a) are not false, fraudulent, misleading, deceptive or

APPENDIX B

unfair, (b) are not likely to mislead or deceive, whether because in context they make only a partial disclosure of variables and relevant facts, or for other reasons, (c) do not contain laudatory statements about the member or the member's firm, (d) are not intended or likely to create false or unjustified expectations of favorable results, (e) do not convey the impression that the member or the member's firm is in a position to influence improperly any court, tribunal or other public body or official, (f) are not intended or likely to encourage a legal action or position being taken or asserted primarily to harass or maliciously injure another, (g) are not intended or likely to appeal primarily to a person's fears, greed, desires for revenge or similar emotions, (h) do not contain representations or implications that are likely to deceive or to cause misunderstanding, (i) are not part of a solicitation of professional employment prohibited under (A) of this rule.

(2) Only members who hold a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Board of Governors may use the terms "certified specialist," "specialist," "specialty," "specializes" or "specializing" in describing themselves or the nature of their practice; and only members who are registered to practice in patent matters before the United States Patent and Trademark Office may use the words "patent" or "patents" in describing themselves or the nature of their practice.

The member shall maintain, for one year, in his or her files, a true copy of any such publication pertaining to the member or the member's firm and shall, upon request, make said copy available to the State Bar.

(D) In addition to the conduct permitted by this rule, members of the State Bar and law firms may continue to be listed in a telephone directory, community directory or guide, law list or legal directory, or in a membership roster, membership register, membership directory or other membership directory or other membership list of a service club, charitable organization, fraternity, school alumni association or business, professional or trade association to which the member belongs, in the manner previously permitted by Rules 2-103(A)(5), (6) and (7) and 2-106(4) of the Rules of Professional Conduct extant immediately prior to effective date of this rule.

In re Smith  
(U.S. Sup. Ct. Docket No. 77-56)

THE FACTS, ACCORDING TO:

Hearing Panel  
(Adopted by  
Supreme Court of  
South Carolina)  
Source: 233 S.E.2d 301

Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

Petitioner is a member of the Bar of this State. [p. 301]  
  
The Respondent, Edna Smith, is a practicing attorney in Columbia, South Carolina, having been admitted to the Bar in September 1972. [p. 302]

Appellant Edna Smith is an attorney licensed to practice law in the State of South Carolina. [p. 2]

Appellant is a black woman who was admitted to the South Carolina Bar in September, 1972. [p. 7]

During the period in which the acts complained of in the complaint occurred, respondent was an associate in the Carolina Community Law Firm, in an expense sharing arrangement with each attorney keeping his own fees. One of the associate attorneys was a staff counsel for the ACLU and was a Counsel of Record in the Pierce case (hereafter mentioned). She was also a legal consultant of the South Carolina Council on Human Relations, from whom she received compensation, and was an officer of the Columbia

At the time of these events, Appellant Smith was engaged in private practice with the Carolina Community Law Firm (the firm's name was later changed to Buhl, Smith and Bagby). (Appellant's law partner, Herbert Buhl, is a staff attorney for the ACLU, receiving a salary for that position; Appellant's other law partner, Carlton Bagby, is a cooperating attorney with the ACLU.) In her capacity as a private attorney, she served as legal consultant to the South Carolina Council on

She is active in the ACLU of South Carolina. [p. 7]



Hearing Panel  
(Adopted by  
Supreme Court of  
South Carolina)  
Source: 233 S.E.2d 301

Branch of the ACLU, and was  
a cooperating attorney with  
the ACLU. [p. 302]

Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

Human Relations, a private organization, for which she received a fee of \$10,000 per year. She also acted as a cooperating attorney with the ACLU, serving as Vice-President and member of the Board of Directors of the South Carolina Chapter of that organization. [p. 2]

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

- -

In 1973, local and national newspapers reported that certain pregnant mothers on welfare in Aiken County, South Carolina, most of whom were black, were being sterilized or threatened with sterilization as a condition for continuing to receive Medicaid assistance. See "3 Carolina Doctors Are Under Inquiry in Sterilization of Welfare Mothers," New York Times, July 22, 1973, p. 30. [p. 7]

In response to information received through the South Carolina Council on Human

Pursuant to the request of her client, the Council on Human Rights, Appellant contacted

Mr. Gary Allen, who was active in a number of community organizations, knew some of the Medicaid patients

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Hearing Panel  
(Adopted by  
Supreme Court of  
South Carolina)  
Source: 233 S.E.2d 301

Relations, she contacted one Gary Allen, in Aiken, South Carolina, to arrange for her to talk to people there who had been sterilized. [p. 302]

Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

one Gary Allen and requested that he set up a meeting between Appellant and certain women in Aiken County, South Carolina, who had been sterilized, or had been advised by their physician that they should undergo sterilization as a means of family planning. [p. 2]

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

who had been sterilized. A local organization to which Mr. Allen belonged contacted appellant through the South Carolina Council on Human Rights, a private, nonprofit organization, with which appellant was also associated, to request advice and assistance on behalf of the welfare mothers. In response to request, appellant went to [the meeting]. [p. 7]

The meeting was held in Aiken during the month of July, 1973, at the office of Gary Allen. Marietta Williams is a Black woman who had consented to be sterilized by Dr. Clovis Pierce. At the meeting in Gary Allen's office, the respondent advised those present, who included Mrs. Williams and other women who had been sterilized by Dr. Clovis H. Pierce, of their legal rights and specifically that they could bring suit

This meeting took place in the latter part of July, 1973. On the day of the meeting, a Mrs. Marietta Williams was approached by Mr. Allen as she left the Aiken County Hospital, where her newborn baby was critically ill. Mr. Allen requested that Mrs. Williams accompany him to his office, stating that there were some people at his office who would like to talk with her about her recent sterilization. Mrs. Williams, although she had no previous knowledge of the meeting, went to Mr. Allen's

In response to the request [from the local organization through the South Carolina Council on Human Rights], appellant went to Aiken, where she met with Mr. Allen and with three women who had been sterilized in Aiken County, including Mrs. Williams, the subject of the alleged solicitation. [p. 7]

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Hearing Panel  
(Adopted by  
Supreme Court of  
South Carolina)  
Source: 233 S.E.2d 301

for money damages against  
Dr. Pierce. [p. 302]

Here, by respondent's own  
testimony, she met with  
Mrs. Williams in Aiken,  
gave unsolicited advice  
as to what her rights  
were as she, the respondent,  
saw them. [p. 304]

Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

office, where she was introduced to Appellant Edna Smith. During the meeting which was attended by two other ladies and members of the press, Appellant advised Mrs. Williams of her legal rights and remedies in regard to her sterilization and informed her of her right to bring an action for money damages against her doctor. In talking with Mrs. Williams and the other ladies, Appellant represented herself to be an attorney and informed the group that the ACLU was an organization that could bring an action on their behalf for money damages against Dr. Pierce, a private physician in Aiken County. After discussing her sterilization with Appellant and being fully advised of her legal rights and remedies, Mrs. Williams informed Appellant that she would contact Appellant, if action. Appellant gave instructions that the ladies should write the ACLU if they desired that organization to bring suit for them. [pp. 2-3]

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Hearing Panel  
(Adopted by  
Supreme Court of  
South Carolina)  
Source: 233 S.E.2d 301

Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

There was no further contact between respondent and Mrs. Williams until Mrs. Williams received a letter from respondent dated August 30, 1973. In this letter respondent referred to the meeting in Mr. Allen's office and indicated that the ACLU would like to file a lawsuit for her for money against the doctor who performed the operation. This letter was written on the

[Appellant had given instructions that the ladies should write the ACLU if they desired that organization to bring suit for them.] In the early part of August, only one request had been received. Appellant was instructed by the ACLU to contact the other ladies again about filing suit. On August 30, 1973, without having been contacted by Mrs. Williams in any way during the

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

Following the Aiken meeting, appellant received several telephone calls and a letter from Mr. Allen, advising her that Mrs. Williams wished to bring suit, and appellant was requested by Mr. Allen to write to Mrs. Williams. (Mrs. Williams testified that she had not told Mr. Allen she wanted to bring suit; however, the uncontradicted testimony of appellant and Mr. Allen was that Mr. Allen had so advised her, and the tribunals below made no finding discounting this testimony.) [p. 7]

In response to this request, appellant wrote the letter of August 30, 1973, that is the subject of this proceeding. [p. 8]

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Hearing Panel  
(Adopted by  
Supreme Court of  
South Carolina)  
Source: 233 S.E.2d 301

Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

Letterhead of the Carolina  
Community Law Firm and  
signed by her as attorney-  
at-law. [p. 302]

interim, Appellant wrote to  
Mrs. Williams on the station-  
ery of her private law firm,  
signing the letter as Attorney-  
at-Law. [p. 3]

Respondent followed up with  
her letter of August 30,  
1973, wherein she solicited  
Mrs. Williams to join in a  
class action suit for money  
damages to be brought by  
the ACLU. [p. 304]

August 30, 1973

Mrs. Marietta Williams  
347 Sumter Street  
Aiken, South Carolina 29801

Dear Mrs. Williams:

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

Now I have a question to ask of you. Would you object to talking to a women's magazine about the situation in Aiken? The magazine is doing a feature story on the whole sterilization problem and wants to talk to you and others in South Carolina. If you don't mind doing this, call me collect at 254-8151 on Friday before 5:00, if you receive this letter in time. Or call me on Tuesday morning (after Labor Day) collect.

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Hearing Panel  
(Adopted by  
Supreme Court of  
South Carolina)  
Source: 233 S.E.2d 301

Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

I want to assure you that this interview is being done to show what is happening to women against their wishes, and is not being done to harm you in any way. But I want you to decide, so call me collect and let me know of your decision. This practice must stop.

About the lawsuit, if you are interested, let me know, and I'll let you know when we will come down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf.

Sincerely,

s/Edna Smith  
Edna Smith  
Attorney-at-Law  
[pp. 25a-26a]

By Appellant's own admission at the disciplinary hearing, the letter was an attempt by her to seek out Mrs. Williams as a member of the plaintiff class in a lawsuit for money damages against the doctor who had performed the sterilization operation. [p. 4]

Shortly thereafter, Mrs. Williams called Appellant and informed her that she did not want to bring a legal action against Dr. Pierce. [p. 4]

Mrs. Williams, shortly after receiving this letter, went to Dr. Pierce's office for treatment for her child. Dr. Pierce's attorney was present, read the letter, and

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Hearing Panel  
(Adopted by  
Supreme Court of  
South Carolina)  
Source: 233 S.E.2d 301

Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

Prior to the institution of this proceeding, a class action entitled Jane Doe and Mary Roe, on their behalf and on behalf of all others similarly situated v. Clovis H. Pierce, M.D., et al., was commenced in the United States District Court of South Carolina to declare the acts of the defendant in violation of the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments of the Constitution, to enjoin such acts, and for money damages and attorneys' fees. [p. 302]

Subsequently, two women did sue Dr. Pierce for money damages. (Doe v. Pierce, No. 74-475 (D.S.C. 1974). Plaintiffs requested \$15,000,000.00 in damages. This case was tried before a jury and resulted in a verdict against Dr. Pierce for one of the plaintiffs in the amount of \$5.00 nominal damages. On appeal, the Fourth Circuit Court of Appeals reversed this judgment finding that Dr. Pierce had not violated that plaintiff's civil rights under Section 1983.) The ladies were represented by attorneys of the American Civil Liberties Union (including Appellant's law partner, Carlton Bagby) who requested on behalf of their

Two women subsequently sued Dr. Pierce, Doe v. Pierce, No. 74-475 (D.S.C. 1974), but neither were represented by appellant or her associate employed by the ACLU. (The letter to Mrs. Williams had been in the possession of Dr. Pierce's attorney since August of 1973, and was known to the South Carolina Assistant Attorney General, who represented other defendants in Doe v. Pierce, in early April, 1974; however, the Attorney General did not forward the letter to the Board on Grievances and Discipline until August 19, 1974, after an attempt to have Doe v. Pierce dismissed for solicitation proved unsuccessful. The letter was forwarded by A. Camden Lewis, an attorney herein and for certain defendants in Doe v. Pierce.) [pp.8-9]

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Hearing Panel  
(Adopted by  
Supreme Court of  
South Carolina)  
Source: 233 S.E.2d 301

Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

clients that the court award attorneys fees. [p. 4]

The evidence presented indicated that the ACLU has only entered cases in which substantial civil liberties questions are involved, and that contrary to their former practice, they are now asking for fees, in addition to any damages that might be awarded to the plaintiffs, and that they are never reimbursed out of the damages awarded the plaintiffs. [p. 303]

Testimony at the hearing established that one of, if not the primary purpose of the ACLU, was the rendition of legal services. It was also set out in respondent's Pre-trial Memorandum that the ACLU and its state affiliates on any given day are involved in several thousand active cases throughout the country. It is, also, the policy of the ACLU to ask for attorneys' fees in their lawsuits, and their fees go into its central fund and are used among other things to pay costs and salaries

The decision below threatens to impair the legal assistance activities on behalf of civil liberties of the American Civil Liberties Union and its affiliated organizations. The ACLU, which is the oldest and largest organization in the nation devoted exclusively to the cause of civil liberties, has for years stated frankly in The Guide for ACLU Litigation, ¶5, that:

It is not necessary to await clients seeking out the Union; it is often better for the Union to take the initiative in civil liberties cases. NAACP v. Button, 371 U.S. 415 (1963), provides that organizations need not stand by while potential litigants forfeit through ignorance their constitutional rights. An organization with our purposes can thus advise people that it will handle cases for them.

The ACLU's opinion of its function is widely shared. Referring to the

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(Adopted by  
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South Carolina)  
Source: 233 S.E.2d 301

Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

and expenses of staff  
attorneys. [p. 305]

The ACLU, the non-profit organization herein involved, by its own admission, may have several thousand lawsuits in progress at any one day and they classify themselves as private attorneys general. It follows, therefore, that its primary purpose is the rendition of legal services. [p. 305]

As pointed out litigation is the primary purpose of the ACLU; it is not simply incidental to its primary purpose. [p. 306]

activities of appellant regarding the origin of Doe v. Pierce, the case subsequently filed on the Aiken sterilizations, the Honorable Sol Blatt, Jr., United States District Judge for the District of South Carolina, made the following statement at a hearing on September 24, 1974:

This Court feels in its posture of [sic] the American Civil Liberties Union has a duty and an obligation under the manner in which it operates to seek out and help those who it feels are not able to help themselves, either their lack of knowledge or lack of funds, the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACLU in contacting. If that in fact did happen. . . (Emphasis supplied.) Deposition of Mary Roe (Shirley Brown), Doe v. Pierce, No. 74-475 (D.S.C. 1974) (Sept. 24, 1974, p. 23).

(Three judges of the United States Court of Appeals for the Fourth Circuit reached a similar conclusion, 33a:

Hearing Panel  
(Adopted by  
Supreme Court of  
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Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

The services of ACLU--assisting lay persons to recognize their legal rights and making counsel available--are the very services for which the individual plaintiff is sought to be disciplined and they are constitutionally protected activities.)

Obviously, if the decision below is sustained, the ACLU and countless other legal assistance organizations will be barred from affirmatively offering assistance to the poor and untutored. (The approach adopted in this case could be applied to the activities of the National Right to Work Defense Fund; the NAACP Legal Defense and Education Fund, Inc.; the Mexican-American Legal Defense and Education Fund; the Sierra Club Legal Defense Fund; the Natural Resources Defense Council; the National Chamber Litigation Center (U.S. Chamber of Commerce); the Puerto Rican Legal Defense and Education Fund; and the Native American Rights Fund, to name only a few.) [pp. 13-15]

Hearing Panel  
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Counsel for Appellee  
(South Carolina  
Disciplinary Agency)  
Source: Motion to Dismiss

Counsel for Appellant  
(Attorney Smith)  
Source: Jurisdictional Statement

The evidence is inconclusive as to whether the respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages. [p. 303]

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In re Smith  
(U. S. Sup. Ct. Docket No. 77-56)

THE RULES

South Carolina

American Bar Association

California

DR 2-103(D)(5)\*

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in

DR 2-103(D)(4)

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101 (B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf

Rule 2-104(F)

(F) The participation of a member of the State Bar in a legal aid plan or program for the furnishing of services to indigents or pursuant to the plan or program of a non-profit organization formed for charitable or other public purposes which furnishes legal services to persons only in respect of their civic or political or constitutional rights and not otherwise in furtherance of such charitable or other public purposes of such organization, and the publicizing of such plans or programs are not, of themselves, violations of these Rules of Professional Conduct provided the name of such member of the State Bar is not publicized. Nothing in this rule shall prohibit a representative of such a plan or program from stating response to inquiries as to the identity of such member of the State Bar such member's name.

\* ABA Disciplinary Rule in effect prior to March 1, 1974



South Carolina

American Bar Association

California

those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

of his client:

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to

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such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances

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of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements, that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

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